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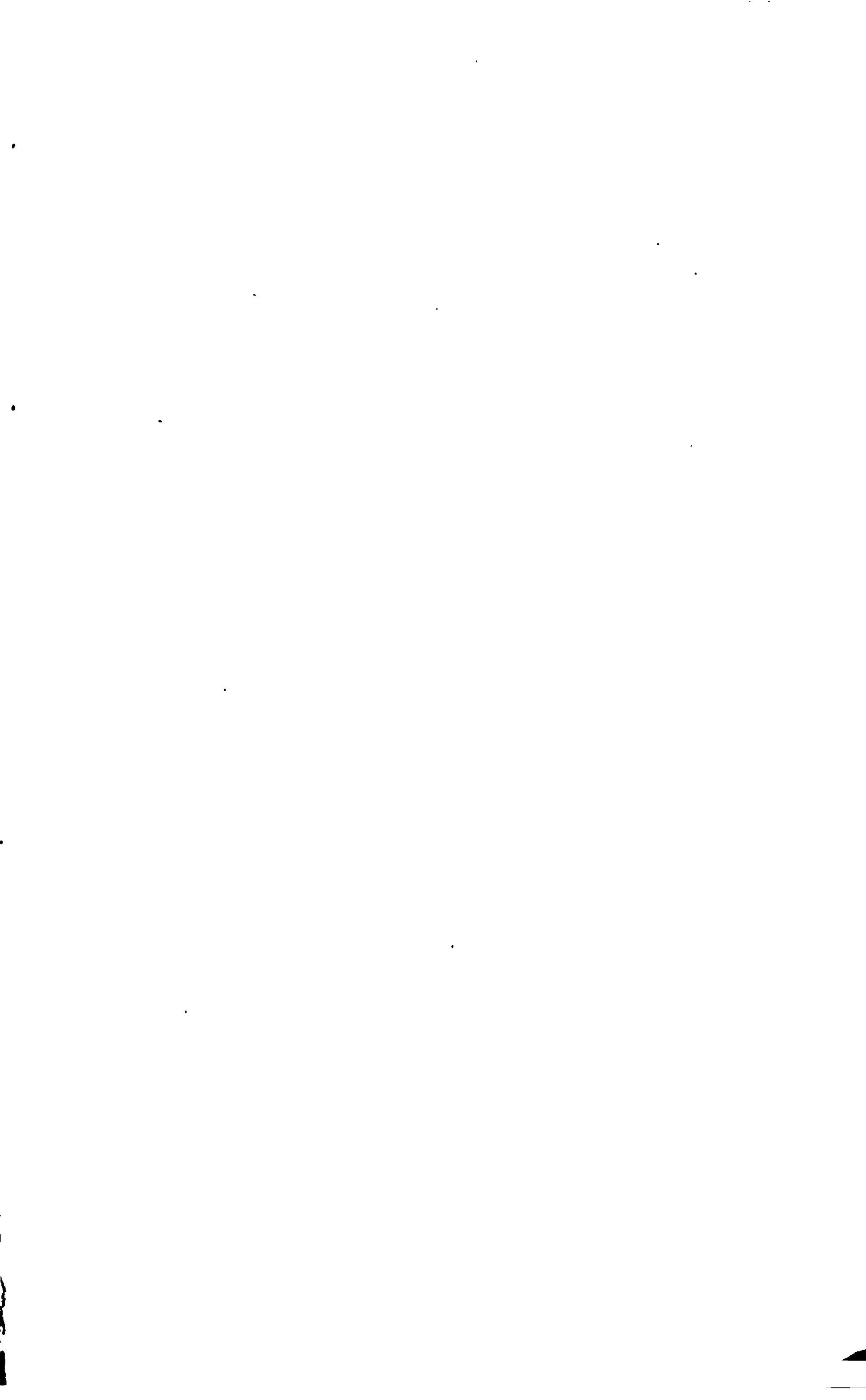
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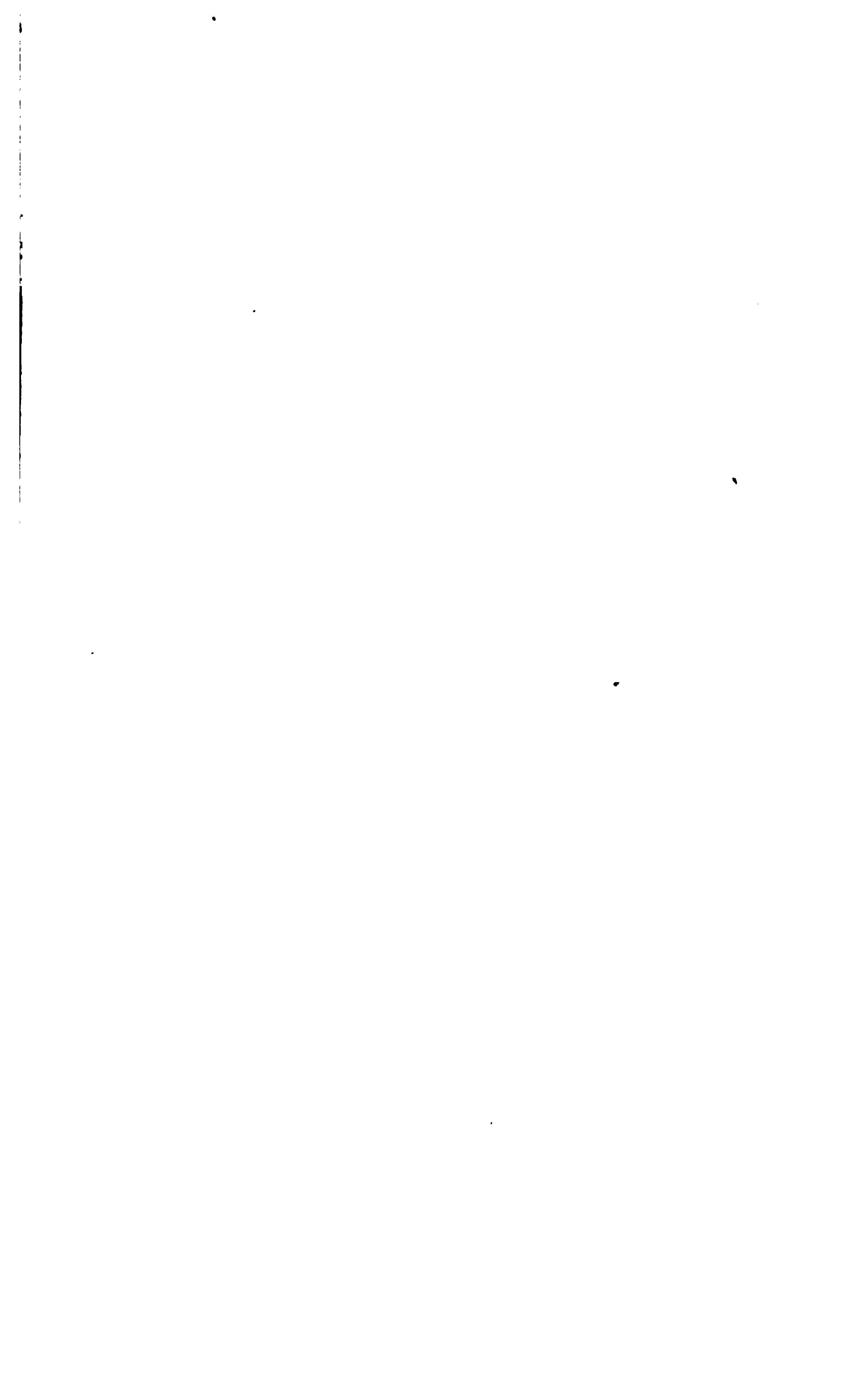
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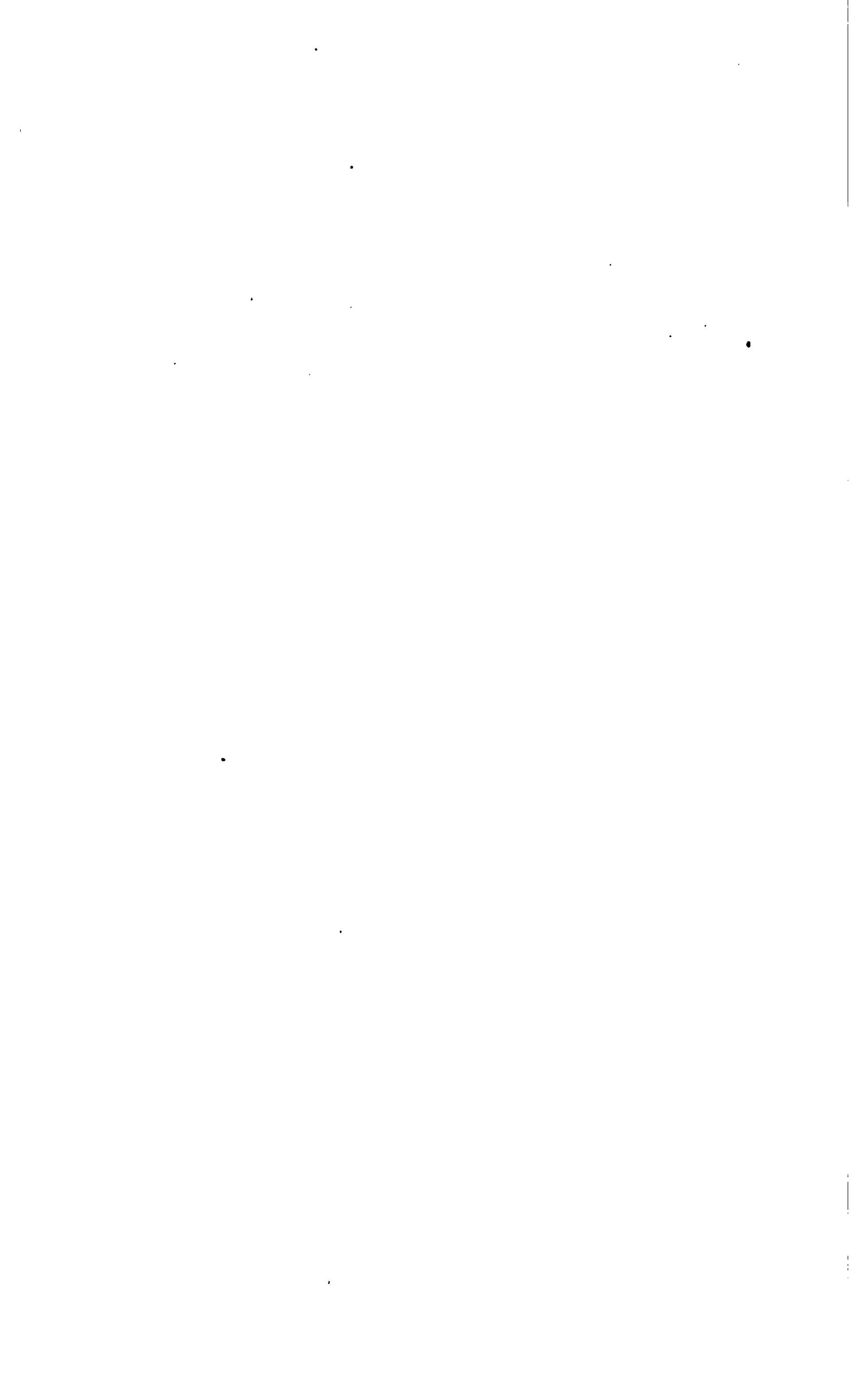
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FOREIGN AND DOMESTIC LAW.



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FOREIGN AND DOMESTIC LAW.

A CONCISE TREATISE

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ON

Private International Jurisprudence,

BASED ON THE DECISIONS IN THE
ENGLISH COURTS.

BY

JOHN ALDERSON FOOTE,

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8°

LONDON:

STEVENS AND HAYNES,
Law Publishers,
BELL YARD, TEMPLE BAR.

—
1878.

LONDON :
PRINTED BY WILLIAM CLOWES AND SONS,
STAMFORD STREET AND CHARING CROSS.

Rec. Oct. 8, 1877

P R E F A C E.

THE fact that twenty years have elapsed since the publication of Mr. Westlake's work on Private International Law, and that no other English writer has since treated exclusively of the subject, may perhaps justify this attempt to supplement the deficiencies which lapse of time has created in that treatise. It is true that a portion of Sir R. Phillimore's voluminous Commentaries on International Law is devoted to this branch of jurisprudence, and that the successive editors of Story's 'Conflict of Laws' have incorporated into the text references to the more prominent of the modern English decisions; but neither of these works appears entirely adequate to the requirements of the practical English lawyer; and the author believes that a less ambitious summary of the English law on the subject may supply a sensible want.

The present work does not purport to be a treatise on Private International Law in the ordinary sense of the phrase. Private International Law is to be collected from the judicial decisions of many nations, and from the writings of many jurists. It would be a superfluous, if not a presumptuous task, to undertake the reproduction and analysis of the materials which Story and Westlake, as well as others, have already handled. So far as those writers have expounded the theory and science of this branch of jurisprudence, their works must remain the classics of the subject, with which no subsequent writer

is likely to compete successfully. The author has accordingly abstained from re-arranging those citations from the jurists which formed the foundation of the science, but which have since become trite under the hands of its professors. The English decisions, on the other hand, which have been built upon that foundation still remain a more or less chaotic mass. Since the publication of Westlake's treatise the importance of the subject, to the English lawyer, has been extraordinarily developed, and it is not too much to say that on almost every branch of it the law has undergone alteration. The index of cases prefixed to the present treatise, as compared with that of the earlier work, will give some idea of the need which exists for a reconsideration of the subject.

The object of the author, then, has been to attempt to reduce into order the mass of materials which has accumulated; and to construct the framework of private international law, not from the *dicta* of jurists, but from the judicial decisions in English Courts which have superseded them. Not only every branch, but almost every ramification of the subject, has now come, directly or indirectly, under the consideration of English tribunals; and it is obvious that in their declarations of opinion the English lawyer, at least, will find his most trustworthy guide. Where their voices are still uncertain, the less authoritative judgments of the text-writers have generally been cited to supplement them.

The summaries which have been subjoined to the different headings are not in any way intended, it is almost unnecessary to say, as an attempt at codification. No branch of jurisprudence is perhaps less adapted to such treatment. They are meant merely to guide the student, to assist reference, and to present the conclusions at which the author has arrived in as clear and definite a form as

possible. Without some such assistance, it would often be difficult to ascertain the whole effect, or what presents itself to the author's judgment as such, of the cases collected and considered under each heading. To express satisfactorily the amount of certainty which in each particular case is justifiable, while avoiding any assumption of dogmatism or formal codification, unsupported by authority, has throughout been the chief consideration. In order to present a general synopsis of the whole subject, the summaries have been reprinted at the end of the book in a continuous form.

J. ALDERSON FOOTE.

2, DR. JOHNSON'S BUILDINGS, TEMPLE,
October 1878.



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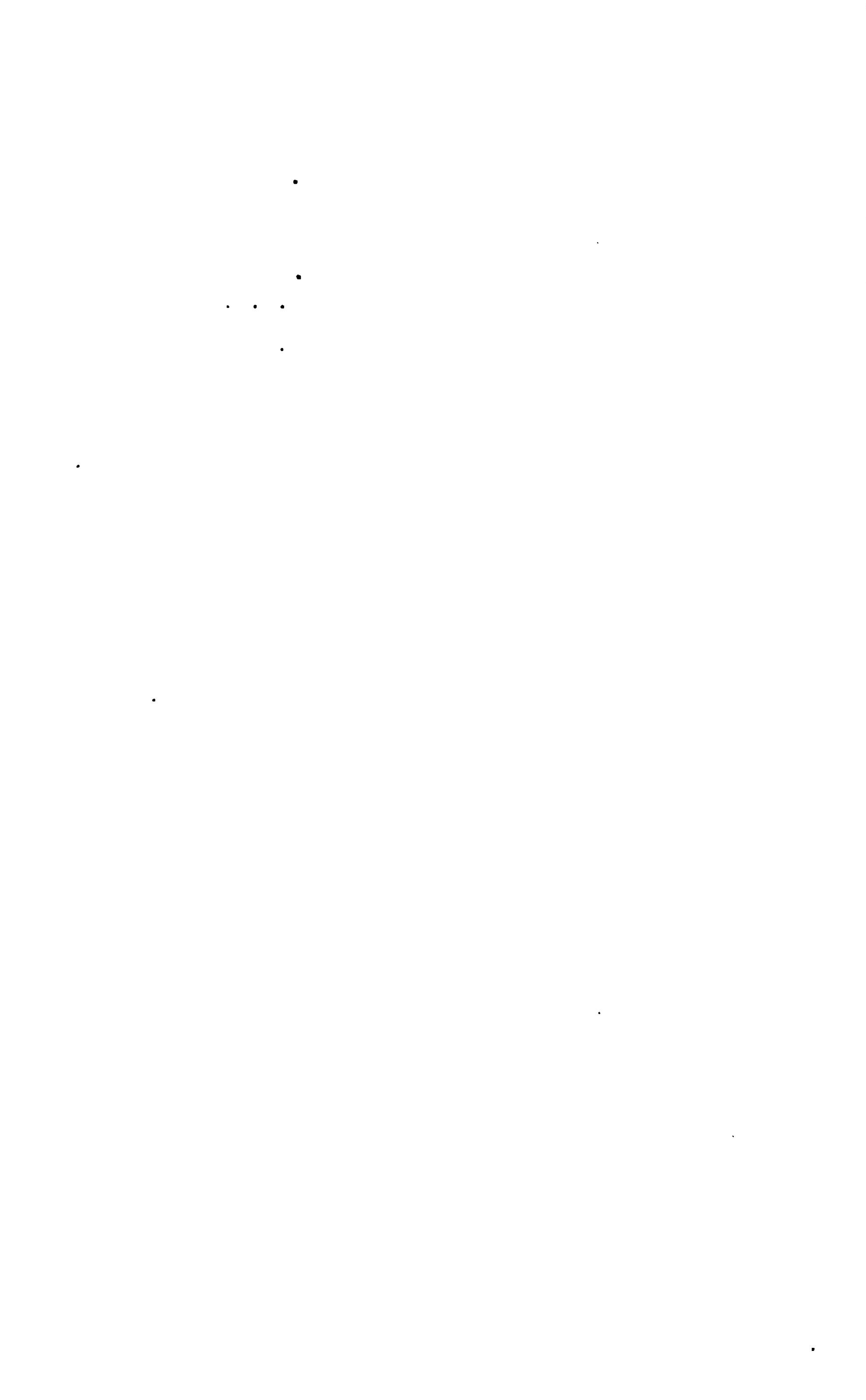
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INTRODUCTORY CHAPTER.

EVERY independent State assumes by its laws to regulate the *status*, the acts, and the property, of those who are subject to it. So long as the persons whom these laws claim to affect, the actions of which they assume control, and the property on which they purport to act, are removed entirely from the operation and influence of the laws of all other independent States, which claim the same privilege of supreme legislation, the only difficulties which can occur are those which belong to the interpretation of a law, about the application of which there is no dispute. Directly, however, that either the persons, the property, or the actions, come within the range of the law of any such foreign state, the question is complicated by the introduction of a new element, and it is often difficult to determine how far each of the contending laws is entitled to the authority which it claims. In order to attain theoretical and perfect simplicity, each group of circumstances, as well as the jural relation between certain persons which results from it, should be under the domain of one law. If the society of each legislating State was entirely isolated, so that the individuals composing it were cut off from intercourse with all but their fellow subjects, the law of each State would have full operation within its own dominions, and could claim to extend itself no further. Once, during the history of the world, this uniformity was practically attained, under the supremacy of Rome, as the result of the unique position which the empire occupied amongst a number of semi-

civilized or barbarous communities, none of whom possessed a system of law which the imperial jurisprudence could stoop to recognise. The law of the Quirites, or *jus civile* proper, was indeed amplified and enriched by the jural customs of the Italian tribes, and the obligations which were based on the *jus gentium* in this sense of the term, being regarded as the natural results of civilization among any body of men, formed eventually no inconsiderable part of the whole body of Roman law. Such rights and obligations, however, when adopted by the civil law (*jure civili comprobatae*) ceased to be, in any sense of the word, foreign to it; and this portion of Roman jurisprudence bore to the original stock a relation more analogous to that which at present exists between the common law and the statute law of England than to any other known to modern jurists. The *jus honorarium*, again, or the equitable law administered by the *prætors*, though specially applied to foreigners and those who were not possessed of the Roman franchise, and though dispensed with a certain regard to the nationality of the parties, was essentially Roman in its nature; and the right of any foreign law or custom to compete with the law as interpreted and enforced by the Roman magistrate seems never to have been asserted. There is not in fact, with the exception of an isolated passage in Gaius (a), which by no means demands such an interpretation, a single *dictum* of the Roman jurists which points to the existence of anything like private international law, in the modern sense of the term. Yet in other respects Roman jurisprudence reached a later stage of development, and ultimately of decay, than that to which any modern system has yet attained. The omission, if Rome had been a sovereign State surrounded by its equals in progress and civilization, would have been inexplicable. The actual relation of the imperial mistress of the world to those who

(a) "Sponsoris et fidepromissoris heres non tenetur; nisi de peregrino fidepromissore quæremus, et alio jure civitas ejus utatur."—Gai. iii. 120, cf. iii. 96.

were by turns her enemies and her dependents offers an intelligible explanation.

Huber, after speaking of the conflict of laws between independent and sovereign States, proceeds as follows: "It is not a matter for surprise that there should be no trace of this subject in Roman jurisprudence. The Empire of the Roman people, extending over all parts of the habitable globe, and everywhere acknowledging one uniform jural system, could never have been exposed to that conflict of various and independent laws which manifested itself as soon as the Empire was broken up into a number of distinct bodies. Nevertheless the fundamental rules of this science must be sought for in the principles of Roman law, and rather in the Law of Nations than in the Roman civil law proper. It is clear that the question of what system of jurisprudence the inhabitants of independent States are to adopt in their mutual intercourse, belongs to the science of the Law of Nations" (a).

The existence of a similar gap in the jurisprudence of the dominant cities of Greece must be referred to a different cause. Between the Hellenes proper and the Barbarians, indeed—and it must be remembered that the Greek regarded as Barbarians all who were not Hellenes—there could of course be no possible international relations, public or private, except those of peace and war. It might, however, have been expected that between such cities as Athens and Sparta, Thebes and Corinth, whose intercourse with each other must have been close and frequent, the necessity of something like a "comity" in international private law would have been felt. Any such comity was, however, foreign to the spirit and traditions in which the Grecian citizen was brought up. The absolute independence and isolation of the Grecian city or State was the most sacred of his political ideas; and the large admixture in Grecian law of a religious element, peculiar to each city, rendered any relaxation of this jealous spirit of exclusion the more difficult. It may be that even these causes would

(a) Huber. *Prælect. Jur. Civ.* vol. ii. lib. I, tit. 8, p. 25.

not have proved efficacious enough to restrain the natural development of international jurisprudence, had that development ever proceeded as far amongst the Grecian cities as it did in the Italian peninsula during the 700 years which followed their downfall. The soil of Greece, however, though the mother of philosophy and the arts, was far less adapted to the nurture of jurisprudence than that of Rome; and though the eloquence of Demosthenes and Æschines may dim the fame of Roman pleaders and modern advocates alike, even the age of such giants of oratory as these remained still, comparatively speaking, the infancy of the science of law.

It is pointed out by Huber, in the passage to which reference has been already made, that the overthrow of the Roman empire, and the birth of a number of European independent States, with different local customs and nascent laws of their own, was the first cause of that *conflictus legum* from which the present system of private international law has sprung. This conflict was most frequently manifested in the competition of personal and territorial laws; *i.e.*, the conflict of the law to which the individual owed obedience by reason of his nationality, with that which claimed to command him in virtue of his presence within his territorial limits. "The moderns always assume," says Savigny (History of Rom. Law, vol. i. ch. 3), "that the law to which the individual owes obedience is that of the country where he lives; and that the property and contracts of every resident are regulated by the law of his domicil. In this theory, the distinction between native and foreigner is overlooked, and national descent is entirely disregarded. Not so, however, in the middle ages, when in the same country, and often indeed in the same city, the Lombard lived under the Lombardic, and the Roman under the Roman law. The same distinction of laws was also applicable to the different races of Germans, Frank, Burgundian and Goth, resident in the same place, each under his own law." It may probably be assumed, however, that the personal laws of *isolated*

foreigners were not at any period of the middle ages recognised from disinterested motives; and that what is called the comity of nations in this respect arose only when the intercourse between independent States was so frequent and so widely-spread that it was necessary for each to adopt some such system in order to secure its reciprocal advantages. It is further pointed out by Savigny, that the presence of a large foreign element in any State sufficiently large to make its voice heard and its interests respected was another cause of its development. But it cannot be said that anything like a system, by which the proper limits of the authority of each municipal law were defined, which is the true scope and object of what is known as private international law, arose until the exigencies of modern commerce and modern civilization demanded it (a). Geographical divisions, whether natural or political, have ceased in the present day to offer any real obstacle to the intercourse of nations; and how much the modern facilities for such communication have contributed to the development of the subject, will be better understood when a brief classification of its subject-matter has been given.

All municipal law—that is, all law enacted for its subjects by the legislative authority of an independent State—is particular in its application. In other words, such law is intended to apply to part only of mankind, and to them, in the majority of cases, only upon part of the earth's surface. Within its own territorial limits, and with regard to its own subjects, the law of an independent State is of course supreme; but its authority is more questionable with respect to the subjects of other States within those limits, or to its own subjects when beyond them. The personal law to which each individual was originally subject was undoubtedly the law of the State to which he belonged

(a) It is unnecessary, for the purposes of this work, to refer to the earlier writers by whom the principles of this branch of jurisprudence were first treated. They will be found collected in a convenient form, with the dates and titles of their works, at the commencement of Story's 'Conflict of Laws.'

by nationality ; but in modern civilization the element of *residence* has been largely substituted for that of nationality, and the personal law of the individual is now commonly regarded as the *lex domicilii*, or law of the country in which he has fixed his home, rather than the *lex patriæ*, or law of the State to which he owes the allegiance of a subject. The distinction between *nationality* and *domicil*, in order to determine the nature and operation of the personal law, must therefore be considered ; as well as the other attributes which give to persons their legal existence. In connection with this part of the subject, it will be useful to consider some special classes of persons, such as foreign corporations, States, sovereigns, and bodies politic, upon which the effect of personal as well as territorial law must necessarily be peculiar. Having thus ascertained what persons are recognised by municipal law, and how far different municipal laws may come into conflict respecting them, it will be necessary to treat of their property and their actions, shewing the chief occasions upon which a similar conflict of law may arise. Lastly, there will remain for consideration the subject of procedure, in connection with those matters which the law of every tribunal, in its own right as the *lex fori*, may claim to decide for itself. Subordinate to this branch of inquiry will be the discussion of the recognition and enforcement of the decrees of one tribunal in those of another country—in other words, the question of the validity of foreign judgments. The following synopsis of the subject may therefore be presented.

PART I.—PERSONS. (CH. I.—V.)

(a.) *Natural Persons.*

All laws being commands directed to persons, and affecting them in different ways, directly or indirectly, positively or negatively, the relation of the person to law must be clearly defined. This relation depends upon three elements (1) nationality, (2) *domicil*, (3) capacity. Taken together

- the three constitute the *status* of the person, i.e., the relation or standing of the person with respect to the law of the society in which he lives, and to the other members of that society.

(1.) *Nationality*.—Nationality is the relation of the person to the sovereign State to which he owes allegiance, and exists either by birth or acquisition. It has already been pointed out that domicil has for many purposes in modern days taken the place that nationality formerly occupied, but the latter has still an importance of its own.

(2.) *Domicil*.—Domicil constitutes that relation of the person to a particular State which arises from residence within its limits as a member of its community, and determines the personal law which controls him and his movable property.

(3.) *Capacity*.—Capacity is the actual and legal power of acting as a free sane adult, and is only important in cases of its negation, as in the instance of a minor or lunatic.

In addition to these three elements of status, there is the fourth quasi-element of legitimacy ; which, however, does not affect the general legal position of the person, but merely his relationship to certain other persons, and is not practically referred, in England, to a personal law. For its proper appreciation it will be necessary to discuss the law of marriage, of which it is a consequence.

(b.) *Artificial and Conventional Persons*.

(1.) *Corporations*.—Corporations are artificial persons, created by some municipal law, invested with certain attributes analogous to those of natural persons, and recognised by international comity beyond the territorial limits of the law which created them.

(2.) *Sovereign States*.—States are artificial persons, created by the law of nations, sometimes impersonated in the form of an actual sovereign, sometimes in an abstract form only, and recognised by the governments and the tribunals of similar States.

PART II.—PROPERTY. (CH. VI.—VII.)

It has been said that all law is directed towards persons, but it is obvious that in every case it must be directed to persons only with reference to their property or their actions. All property is divided into

(1.) *Immovable Property*.—Under this head comes all landed property, and things so connected with the soil as to be regarded by the law as part of it; including not only real estate by English law, but chattels real, or immovable personality.

(2.) *Movable Property*.—Under this head come all things which can be the subject of ownership that are not included in immovable property. These are regarded as adjuncts to the person of the owner, and are theoretically subject to his personal law.

Both these descriptions of property must be considered with reference to

- (i.) Jurisdiction.
- (ii.) Alienation by act or will of the owner, including
 - (a.) Transfer *inter vivos*.
 - (b.) Disposition by will.
- (iii.) Alienation by operation of law, including
 - (a.) Succession on intestacy.
 - (b.) Transfer on bankruptcy.
 - (c.) Transfer on marriage.

So far as any of these occasions or incidents may give rise to a conflict of two or more municipal laws.

PART III.—ACTS. (CH. VIII.—IX.)

The actions of persons of which the law takes notice must be either (1) contracts, (2) torts, or (3) crimes.

(1.) *Contracts* may give rise to a conflict of municipal laws, in respect of their

- (a.) Formalities.
- (b.) Legality.
- (c.) Construction and interpretation.

- (d.) Nature and incidents of the obligation.
 - (e.) Performance.
 - (f.) Discharge other than performance.
- (2.) *Torts* may give rise to a conflict of municipal laws, in respect of the
- (a.) Tortious or innocent nature of the act.
 - (b.) Measure of the wrong done.
 - (c.) Measure of the remedy.
- (3.) *Crimes*.—Inasmuch as crimes give rise to no obligation or jural relation *inter personas*, but only between the offender and the State whose law has been transgressed, they do not properly fall within the domain of *private* international law, and will not be considered here. A crime is, in fact, only a tort regarded in its relation to the State.

PART IV.—PROCEDURE. (CH. X.—XI.)

(1.) *Procedure generally*.—The law of every country is appealed to by means of its tribunals. These will accept the decision of the competent law on each and all of the points already enumerated, that law being determined on the principles of private international law. They will, however, only grant their own remedies, according to their own rules. Hence the necessity of defining those matters which every tribunal will claim to decide arbitrarily for itself, as coming under the head of *procedure*.

(2.) *Foreign Judgments*.—In connection with all the subjects enumerated in Parts I.—III., it frequently happens that the matters brought before a Court for its decision have already been the subject of inquiry and adjudication by some tribunal of a foreign State. It is necessary, therefore, to consider the recognition accorded to foreign judgments in an English Court, and the manner in which they may be enforced, as a branch of the subject of procedure, both in the case of decrees *in personam*, and judgments *in rem*, as well as those on the *status* of a person, which partake of the nature of both.

FOREIGN AND DOMESTIC LAW.

Part I.—PERSONS.

CHAPTER I.

NATIONALITY.

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CAP. I.

Of the elements which compose a man's *status*, viewed as a subject of law, nationality is the first and most important. By a man's nationality is meant that political relationship which exists between him and the Sovereign State to which he owes allegiance; and this relationship is fixed, in different countries, by varying rules and principles.

According to the English Common Law, nationality depended in all cases upon the place of a man's birth, following the feudal principle, which to a certain extent regarded all inhabitants of the soil as appendages to it. The view taken of the question by Roman law, which referred all questions of a man's *status* to that of his parents, was absolutely unrecognised in England until its statutory adoption; and the sole consideration was, whether the individual whose nationality had to be determined was or was not born within the king's allegiance. The only exceptions to this rule were those imposed by the doctrines of public international law, which required that the children of foreign ambassadors, to whom the privilege of extritoriality was attached, should be exempted from the rigour of the feudal principle; and further considered that the territory of any State, while

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**Statutes
regulating
nationality.**

in the hostile occupation of an enemy's army, lost for the time being the national character which properly belonged to it. With these apparent exceptions, consistent in reality with the rule itself, all who were born on English soil, and no others, were English subjects.

The first statute which qualified this principle was the 25 Edw. III. st. 2, which provided that "all children inheritors which from henceforth shall be born without the legiance of the King of England, whose fathers and mothers at the time of their birth shall be in the faith and legiance of the King, shall have and enjoy the same benefits and advantages, to have and bear the inheritance within the same legiance, as other inheritors aforesaid, in time to come; so always the mothers of such children do pass the sea by the license and will of their husbands." It will be observed that the privileges of inheritance only (a) were conferred by this statute; and it was decided (b) that it did not confer even these upon the children of an English mother, by an alien father, born out of the allegiance. More recent statutes have, of course, robbed this decision of any importance. Even under this statute, it was not required that the mother should be of English nationality, it having been decided in *Bacon's Case* (c) that the alien wife of a British subject was *quasi* under the King's allegiance (d).

By 7 Anne, c. 5, s. 3, it was next enacted that "the children of all natural-born subjects, born out of the allegiance of Her Majesty, her heirs and successors, shall be deemed adjudged and taken to be natural-born subjects of this kingdom, to all intents, constructions, and purposes whatsoever." The principle just adverted to, as having been decided in *Bacon's Case*, that the transmission of nationality depends upon the father alone, was incorpo-

(a) But see Lord Bacon's argument in *Calvin's Case* (2 St. Tr. 585), and *Bac. Ab. tit. "Aliens."* A.

(b) *Durore v. Jones*, 4 Term Rep. 300.

(c) *Cro. Ch. 602.*

(d) By the common law, however, a woman's nationality was unchanged by her marriage: Co. Litt. 31 b; *Countess of Conway's Case*, 2 Knapp, P. C. 368; *Countess de Wall's Case*, 12 Jur. 348.

rated with this statute by 4 Geo. II. c. 21, s. 1. But it was not considered that the words "all intents, constructions, and purposes whatsoever," were large enough to include the power of transmitting such nationality to another generation, and 13 Geo. III. c. 21 was passed to add this privilege, thus extending the nationality of the grandfather to the second generation born out of the allegiance. Children of the third generation, on the same construction of the words of the statute, would of course be still excluded.

The statute 7 & 8 Vict. c. 66, by which considerable alteration in the law of nationality was effected, has now been repealed by 33 & 34 Vict. c. 14, which embodies the recent legislation on the subject, and regulates the manner in which British nationality may be acquired or divested. It therefore becomes unnecessary to examine the previous statutes on the subject of naturalization, most of which have been repealed by the last-mentioned enactment.

This Act (33 & 34 Vict. c. 14) was passed after the Naturalization Act, 1870, report of a commission appointed to investigate the subject, and embodies many of the recommendations of Lord Chief Justice Cockburn, contained at the end of his pamphlet 'On Nationality,' published in 1869. By s. 2, it is enacted that aliens may take, hold, and dispose of real and personal property as if natural-born subjects, with the single exception of British ships (s. 14), and with the proviso that no qualification for franchise or office is thereby conferred. The third and fourth sections provide that naturalized aliens, subjects of other states born within British dominions, and children born abroad of British fathers, may divest themselves entirely of British nationality by a formal declaration of alienage. The sixth section enacts that a similar effect shall be produced by voluntary naturalization abroad, with a proviso to meet the case of British subjects so naturalized abroad previous to the passing of the Act. Section 7 provides for the naturalization of aliens by a certificate from a Secre-

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tary of State, to be granted under certain conditions, and enacts that such naturalization shall be deemed to confer *all* political and other rights and liabilities. This provision is made applicable, by s. 8, to the case of British subjects who have lost their original nationality under s. 6. As to aliens naturalized under these two sections, it is provided that, when within the limits of the State to which they formerly belonged, their nationality shall not be deemed to be British unless, by the laws of that State, they have ceased to be its subjects. Section 9 gives the form of the oath of allegiance which the earlier sections require to be taken at the time of any naturalization or statutory declaration of nationality. Section 10 relates to the *status* of married women and children, and in effect provides as follows: By marriage a woman acquires the nationality of her husband; and a British female subject who has thus become an alien, may, if she afterwards becomes a widow, be re-admitted to British nationality under s. 8 of this Act. The nationality of children is to be deemed as following that of the father, or of the mother if a widow, and as changing with it.

These are the main provisions of this important statute, which has placed the whole of the English law relating to nationality and naturalization upon a new footing. There are some minor enactments contained in it, which have not yet been mentioned. The right of trial by a jury *de medietate lingue* is abolished (s. 5). No right to hold real property situated out of the United Kingdom is conferred (s. 2, sub-s. 1). Estates and interests in real and personal property to which any person has become entitled by a disposition made or a death happening before the Act are not to be affected (s. 1, sub-s. 3). And a British subject who has become an alien under the Act is not to be thereby discharged from liability for acts done before such change of nationality (s. 15).

A question which has often arisen, respecting the power of the British colonies to confer British nationality, is set at rest by s. 16, which enacts that all laws duly made by

the legislature of a British possession for this purpose shall be valid *within the limits* of that possession, subject to the power possessed generally by Her Majesty of confirming or disallowing any of the laws of such British possession (a).

This Act was amended in 1872 by a short Act (35 & 36 Vict. c. 39) which provided that the mode of renouncing nationality agreed upon by a convention between Her Majesty and the United States, dated February 23, 1871, should be deemed to be authorized by the Naturalization Act of 1870. The third section of this amending Act also enacted that the rights and property of women, married before the passing of the Act of 1870, should not be prejudicially affected by it.

It will be seen that all the legislation, which has taken place on this subject, proceeds on the principle that a man is unable of himself, without statutory assistance, to change his nationality. In the words of Lord Hatherley in *Udny v. Udny* (b), "the question of naturalization and allegiance is distinct from that of domicil. A man cannot, at present at least, put off and resume at will obligations of obedience to the government of the country of which at his birth he is a subject, but he may many times change his domicil." The Act of which a summary has just been given has rendered that possible which was not so, in England at least, when Lord Hatherley spoke, but the essential distinction between domicil and nationality must nevertheless be borne in mind in considering its provisions. In *Moorhouse v. Lord* (c), Lord Kingsdown, speaking of the acquisition of a French domicil, is reported as saying that, in order to effect such a result, a man must intend to become a *Frenchman instead of an Englishman*. But, as Lord Westbury points out, in his judgment in the case of *Udny v. Udny* (d), just referred

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(a) See 10 & 11 Vict. c. 83, the former statute on this subject.

(b) *Udny v. Udny*, L. R. 1 H. L., Sc. 441, 452.

(c) 10 H. L. C. 272. And see *Haldane v. Eckford*, L. R. 8 Eq. 631; *In re Capdevielle*, 2 H. & C. 985, and *Attorney-General v. Countess de Waldstatt*, 3 H. & C. 374.

(d) L. R. 1 H. L., Sc. 460.

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Inhabitants
of ceded terri-
tory.

to, these words are likely to mislead, if they were intended to signify that for a change of domicil there must be a change of nationality, that is, of natural allegiance. That would be “to confound the political and civil states of an individual; and to destroy the difference between *patria* and *domicilium*.” This essential distinction will become more manifest, when the law of domicil has been considered.

Apart from the provisions of the Naturalization Act, 1870, which have been just explained, the rules as to the transfer of allegiance, on the cession or abandonment of British territory, should be here noticed. In *Doe v. Acklam* (*a*), it was held that children born in the United States, after the recognition of their independence, of parents born there before that time, and continuing to reside there afterwards, were aliens. But in the subsequent case of *Doe v. Mulcaster* (*b*), it was held that where the parents, at the time of the severance between the countries, elected to retain their British nationality, they were able to do so, and to transmit it to their children. Mr. Westlake (Priv. International Law, § 27) says that the question, in which cases, is to be decided by the voluntary transfer or retention of domicil; and this is the test generally agreed upon in the treaties which are made between independent States when territory is exchanged or abandoned. It is not likely that, so far as the English lawyer is concerned, a case unprovided for by treaty will ever arise.

(*a*) 2 B. & C. 779.

(*b*) 5 B. & C. 771.

SUMMARY.

Nationality, according to the English Common Law, was decided absolutely and once for all by the place of birth. Those who were born within the allegiance of the British Crown, and those only, were regarded throughout their lives as British subjects.

By the statutes previous to 33 & 34 Vict. c. 14 (25 Edw. III. st. 2, 7 Anne c. 5, s. 3, 4 Geo. II. c. 21, and 13 Geo. III. c. 21) the privileges of nationality were conferred on the descendants, up to and including the second generation, of a natural-born British subject who were born abroad, the transmission of this statutory nationality depending upon the father alone.

By 33 & 34 Vict. c. 14, the restrictions on the capacities of aliens were abolished so far as the power of inheriting or otherwise taking British land was concerned, and statutory means were provided (superseding those which had formerly existed) for the naturalization and de-nationalization of aliens in Great Britain, and of British subjects abroad.

The nationality of a married woman follows that of her husband, and the nationality of children follows that of the father, or of the mother if a widow. A married woman who becomes a widow may change her nationality under the provisions of 33 & 34 Vict. c. 14.

The legislatures of British possessions and colonies may confer a limited British nationality, valid within their territorial limits.

On the cession or abandonment of territory, by conquest or otherwise, the nationality of the inhabitants is generally provided for by treaty; but in the absence of treaty provisions, will probably depend upon the voluntary transfer or retention of their domicil.

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**Domicil—
defined and
explained.**

CHAPTER II.**DOMICIL.**

By the law of England, and of all other civilized countries, each individual has ascribed to him at his birth two distinct legal *status* or conditions; one by virtue of which he becomes the *subject* of some particular country, binding him by the tie of natural allegiance, which is called his political *status* or nationality, and which has been discussed in the preceding chapter; the other, by virtue of which he becomes the *citizen* of some particular country, as such possessed of certain municipal rights, and subject to certain obligations. This is called his civil *status*, entirely distinct from the first, which depends on different laws in different countries; whereas the civil *status* is governed universally by the single principle of *domicil*, the criterion established by international law for determining it (a). As to the proper definition of *domicil*, much difficulty has always been felt. Dr. Phillimore defines it as "a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time" (b). There can be no doubt that this is the *kind* of residence which is essential to *domicil*, but the conception itself may be, perhaps, more accurately explained as *the relation of an individual to a particular State which arises from his residence within its limits as a member of its community*. There must be always one particular State towards which this relation exists, and there can never be more than one at

(a) Per Lord Westbury in *Udny v. Udny*, L. R. 1 H. L., Sc. 460.

(b) Phillimore's Law of Domicil, p. 13. Adopted by Lord Westbury in *Udny v. Udny*.

the same time (*a*). (Story's Conflict of Laws, § 45.) Mr. Westlake (Private International Law, § 30) asserts that domicil is "the legal conception of residence," particularized and defined only for the sake of legal precision; but as he admits immediately afterwards that residence is not domicil, unless accompanied by the particular circumstances under which the law will recognise it, it is evident that such a definition is not entirely satisfactory (*b*). What those circumstances are is just the question which it is the object of definition to answer. Where a man resides is always a matter of fact (*c*), and when this fact is once ascertained, the legal idea of domicil comes at once into existence.

The domicil which attaches to a man at the moment of his birth, generally spoken of as the domicil of origin, is, in ordinary cases, that of his father; though where a child is posthumous or illegitimate (*d*) the domicil of its mother is necessarily taken to decide its own. Cases can of course be suggested where the domicil must be decided by the place of birth, or even some other place; as, for instance, in the case of a child found exposed, whose parents are unknown. In ordinary cases, however, the domicil of origin is that of one of the parents, and during legal infancy it changes with that from which it is derived. Mr. Westlake points out (P. I. Law, § 37) that a married minor must be regarded as *sui juris* for the purposes of domicil, since on his or her marriage a new home is founded. In such a case the question would appear to be one of fact, and if the minor, after the ceremony of marriage, continued to reside with his or her parents, there would be no occasion to consider it, inasmuch as there would be only one locality to which the domicil could

(*a*) As to the possibility of a double domicil, see *Somerville v. Somerville*, 5 Ves. 749.

(*b*) See *Mallass v. Mallass*, 1 Roberts, 74, and *Munro v. Munro*, 7 Cl. & F. 842.

(*c*) *Bempde v. Johnstone*, 3 Ves. Jun. 201.

(*d*) If, however, an illegitimate child have a father whose paternity is fixed, by acknowledgment or otherwise, the domicil of that father attaches to it: *Re Wright's Trusts*, 2 K. & J. 595.

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possibly be attributed. It is apparent that the domicil of an orphan must be decided by that of its legal guardian, and when this test cannot be applied, it becomes a question of the place where the child in fact resides. A doubt has, however, been raised, whether the legal guardian of an infant can change its domicil, with the effect in many cases of bringing it under the influence of a law of succession more favourable to himself. It is quite clear that when that guardian is a surviving mother, or even, it would seem, a step-mother, and there is no suggestion of fraudulent intention, the change can effectively be made (a). In other cases, however, there is more doubt, and Story suggests that it is extremely difficult to find any reasonable principle by which a guardian, not a parent, can alter by a change of domicil the right of succession to the minor's property. English law is barren of authority on the subject (b), but the inquiry as to what is sufficient to change the domicil of adults is a more fruitful one, and has given rise to a mass of litigation.

Domicil by acquisition.

The domicil of origin adheres until a new domicil is acquired (c), and in the case of an adult this change is effected by a *de facto* removal to a new place of residence, together with an *animus manendi* (d). As to the *factum* of removal, it is apparently now settled by the case of *Udny v. Udny* (e) that a new domicil is not acquired until the transit is complete, and that when a domicil of choice is abandoned, the domicil of origin revives until a new one is completely fixed. In Lord Hatherley's words in the case cited, a man may not only change his domicil, but also abandon each successive domicil *simpliciter*, so that the original domicil *simpliciter* reverts; and this doctrine was accepted and approved by the Master of the Rolls (Sir G. Jessel) in the recent case of *King v. Fox-*

(a) *Pottinger v. Wightman*, 3 Meriv. 67.

(b) Story, § 506, n.; Burge on For. and Col. Law, pt. i. c. 2, pp. 38, 39; Robertson on Succession, p. 196.

(c) *Bell v. Kennedy*, L. R. 1 H. L., Sc. 307; *Udny v. Udny*, *ib.* 460.

(d) *Douglas v. Douglas*, L. R. 12 Eq. 617; *Haldane v. Eckford*, L. R. 8 Eq. 631; *De Bonneral v. De Bonneval*, 1 Curt. 864.

(e) L. R. 1 H. L., Sc. 460.

well (a). In the absence of evidence the domicil of origin must of course be presumed to have continued, so that the burden of evidence will be on the party who alleges its abandonment (b). If the domicil of origin reverts when an acquired domicil is abandoned without a new one being acquired, it would naturally follow that, with regard to the domicil of origin itself, mere abandonment is not sufficient to divert it. In other words, a domicil of origin cannot be abandoned unless and until a new one is acquired. Accordingly it was held by Lord Alvanley, in *Somerville v. Somerville* (c), whose judgment is cited with approval by Sir C. Cresswell in *Crookenden v. Fuller* (d), that "the original domicil is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil and taking another as his sole domicil"—a *dictum* the peculiar wording of which is due to the fact that in *Somerville v. Somerville* the Court was called upon to lay down that for purposes of succession a man can have but one domicil. That mere abandonment was not in any case sufficient to divert domicil had been held by Sir John Leach in *Munro v. Douglas* (e), and Mr. Westlake, in suggesting the theory that the domicil of origin reverts *in transitu*, adds that he finds no English authority for the proposition, except for the purposes of prize cases in the Admiralty Courts (f). The *dicta*, however, in *Udny v. Udny* and *King v. Foxwell* just adverted to must now be taken as decisive of the question. Mere abandonment divests all domicils except that of origin. The domicil of origin of necessity adheres until a new one is acquired, as if this were not so, the man who had left the country of his home for the first time would be left *in itinere* without any domicil at all, a condition of

(a) L. R. 1 Ch. D. 518.

(b) *Crookenden v. Fuller*, 29 L. J. P. & M. 1.

(c) 5 Ves. 786.

(d) 29 L. J. 8 P. & M. See *Munro v. Munro*, 7 Cl. & F. 842; *Collier v. Rivaz*, 2 Curt. 855; *Hodgson v. De Beauchesne*, 12 Moo. P. C. 285.

(e) 5 Madd. 405.

(f) P. I. L. § 39.

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things which cannot possibly exist. But the abandonment of the acquired domicil must of course be complete ; and it has been held that a French domicil by acquisition is not so abandoned by mere embarkation on a vessel bound for England, the person in question being compelled by ill-health to re-land, and having never in fact quitted the French harbour (*a*).

*Animus
relinquendi.*

Accompanying the *factum* there must necessarily be an *animus relinquendi*, or the abandonment would be in reality no abandonment at all. It is this *animus* which constitutes the whole difference between mere absence from the domicil and its relinquishment ; and while a man may divest himself of an acquired domicil in an hour by crossing the territorial limit of the State with the intention of permanently quitting it, he may, without such intention, wander over the face of the earth for years and preserve his domiciliary *status* unaffected. Subsequent declarations will of course be received as evidence that this *animus relinquendi* was absent when the country of the domicil was quitted, as in the cases of *Jopp v. Wood* (*b*) and *In re Capdevielle* (*c*) ; and it is clear that proof of an *animus manendi* in the country of the new home will conclusively establish the intention to abandon the old. If, however, it is shewn that the *animus relinquendi* or *non revertendi* never came into existence, as in the case of political refugees and exiles (*d*), it is of course unnecessary to inquire further. The *animus relinquendi* is in practice almost identical with the *animus manendi*, when the latter exists ; and it is only in cases of mere abandonment, according to the principle stated in *Udny v. Udny* (*e*), that the consideration of the former by itself is necessary or practicable. Next, with regard to the necessary *animus* for the acquisition of a new domicil, when the transit to its locality is complete, there

(*a*) *In the Goods of Raffenel*, 32 L. J. P. & M. 203.

(*b*) 34 L. J. Ch. 212.

(*c*) 33 L. J. Ex. 306.

(*d*) *Collier v. Rivaz*, 2 Curt. 858 ; *De Bonneval v. De Bonneval*, 1 Curt. 856 ; *Burton v. Fisher*, 1 Milw. 183.

(*e*) L. R. 1 H. L., Sc. 452 ; *ante*, p. 10.

*Animus
manendi.*

is in theory no difficulty. There must be, in addition to the *animus non revertendi* to the old home, an *animus manendi* in the new. In the words of Dr. Phillimore, which have been already cited, there must be positive or presumptive proof of an intention to remain in the locality chosen for an unlimited time. It may be mentioned that the oath of a person whose domicil is in question as to his intention to change his domicil is not conclusive, but is evidence for the Court to take into consideration (a). And in *Manning v. Manning* (b) the affidavit of a husband, who petitioned for a divorce, that he had settled in England with an *animus manendi*, was disbelieved. Whether mere length of residence will in itself amount to such presumptive proof as is required may be doubted (c), and there must always necessarily be other facts from which such an intention may be implied.

The "intention" which is here spoken of is necessarily a vague expression, involving elements of law as well as fact, and much difficulty has been felt in defining it more closely. The ordinary rule that a man must be taken to intend the legal consequences of his act, fails in application when the intention itself forms the principal part of the act in dispute; and it has been argued with some force, that since a change of domicil depends upon intention alone, an expressed intention to retain a domicil of origin must be given full effect, though the intention to establish a permanent home or residence in the new locality be put beyond a doubt (d). It has been contended, and perhaps was at one time the law of Scotland (e), that in order to prove a change of domicil, it is necessary to shew that the person concerned intended to change his civil *status*, to give up his position as a citizen of one country, and to assume a position as the citizen of another. The English law, however, may now be regarded as definitely settled on

(a) *Wilson v. Wilson*, L. R. 2 P. & D. 435. (b) L. R. 2 P. & D. 223.

(c) *Jopp v. Wood*, 34 L. J. Ch. 212.

(d) See *Attorney-General v. Waldstatt*, 3 H. & C. 374: *Moorhouse v. Lord*, 10 H. L. C. 272, 292; *Douglas v. Douglas*, L. R. 12 Eq. 617.

(e) *Donaldson v. McClure*, 20 C. of Sess. Ca. (2nd Series) 307.

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this point. The intention required for a change of domicil, as distinguished from the action embodying it, is an intention to settle in a new country as a permanent home; and if this intention exists and is sufficiently carried into effect, certain legal consequences follow from it, whether such consequences were intended or not, and even though the person concerned may have expressed a contrary wish as to the legal result of his acts (a). In the words of Bacon, V.C., it is only necessary to shew that a man has established himself in a country, meaning to reside there all the days of his life (b). Thus, where a British-born subject resided many years at Hamburg under circumstances which afforded evidence of a domicil there, and then made a will in England, where he was present for a temporary purpose, in which he declared that it was not his intention to renounce his domicil of origin as an Englishman, it was held that his declaration of intention could not prevail against the foreign domicil in fact (c). It was said by the Court in that case that such an expression of intention amounted to a desire to have two domicils; or at any rate, to change his domicil in fact without submitting to the consequences in law. A declaration of intention to retain *domicil* itself being thus insufficient, it is quite clear that a declared intention to retain the *nationality* of origin will have even less effect (d). The latter declaration, indeed, seems by itself to be hardly evidence of that intention to keep or transfer the permanent home which the law looks for; while an expressed intention to retain *domicil* itself is undoubtedly some evidence to shew that *domicil* has been retained, though it will not be allowed to counter-balance actual facts. In some cases (e) it has been held, no doubt, that an original *domicil* has been retained by the mere expression of an

(a) *Douglas v. Douglas*, L. R. 12 Eq. 617, 644; *Haldane v. Eckford*, L. R. 8 Eq. 631.

(b) *Stevenson v. Masson*, L. R. 17 Eq. 78.

(c) *Re Stern*, 28 L. J. Ex. 22; 3 H. & N. 594.

(d) *Brunel v. Brunel*, L. R. 12 Eq. 298.

(e) *Jopp v. Wood*, 34 L. J. Ch. 212; *Re Capderielle*, 33 L. J. Ex. 306.

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intention to return before death to the residence which has been abandoned ; but the distinction to be drawn between the principle of these cases and that which was followed in *Re Stern* appears to be, that while a man is not allowed to contradict the legitimate inference from his conduct by the expression of a bare wish to retain a domicil which he has practically abandoned, yet a *bonâ fide* declaration that he means in fact to return to his original residence, will be accepted by the law as evidence that the abandonment has not been complete.

The intention required for a change of domicil, therefore, is that of settling in a new country as a permanent home (*a*) ; but then comes the material question, what is a permanent home, and how is it to be distinguished from a temporary one ? It is not clear whether the fact that a foreign residence has been permanently adopted with a view to the acquisition of a fortune, with the ulterior design of returning when that object is attained, is sufficient in itself to prevent the place of residence becoming that of domicil. According to the view taken by Westlake (P. I. Law, § 38) it is not (*b*), and this is in accordance with the later case of *Allardice v. Onslow* (*c*) ; but the contrary was held by Lord Romilly in 1865 (*d*), though it is to be noted that in the last-mentioned case there was a direct expression of an intention to return to the original place of residence. The prospect of return to their home which is cherished by political refugees is of a more determinate character, and this, so long as the exile is involuntary (*e*), will prevent the substitution of a new domicil for that of origin from being complete (*f*). The same principle, that an involuntary detention is destitute of the requisite *animus*, is applicable to incarceration in prison (*g*).

Distinctive
marks of
permanent
residence or
domicil.

(*a*) *Douglas v. Douglas*, L. R. 12 Eq. 212 ; *Udny v. Udny*, L. R. 1 H. L., Sc. 441.

(*b*) *Bruce v. Bruce*, 2 B. & P. 229, n.

(*c*) 33 L. J. Ch. 434.

(*d*) *Jopp v. Wood*, 34 L. J. Ch. 212.

(*e*) *Collier v. Rivaz*, 2 Curt. 858.

(*f*) *De Bonneval v. De Bonneval*, 1 Curt. 856.

(*g*) *Burton v. Fisher*, 1 Milw. 183.

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interruption.

When the residence is liable to be interrupted at any moment by the intervention of another will, the elements of domicil are incomplete; the *animus* being at most conditional. Thus an officer in Her Majesty's service, who may at any time be required for foreign service, cannot while no such demand is made upon him acquire a domicil abroad (*a*); nor could an officer in the East India Company's employment, who was at all times liable to be recalled to India, acquire one in England (*b*). But the duty of a peer of Great Britain to advise Her Majesty whenever she may call for his advice, or to attend the House of Lords whenever his attendance there is required, whether in any sense a legal duty or not, does not incapacitate him from abandoning his English domicil of origin and acquiring a new domicil abroad (*c*).

Onus of proof. In all cases it must be remembered that the onus of proof is upon the party who alleges a change of domicil (*d*); but it has been held that slighter evidence is required of an intention to revert to a domicil of origin, than of an intention to adopt one entirely new (*e*).

Presumptions
of law. In certain cases, however, the law fixes the domicil of an individual without reference to intention, or the presence of its usual *indicia*; though it would be perhaps more correct to say that in certain cases, the law does not allow the presumption of intention, which it raises for itself, to be contradicted. The most common example of this principle is the rule that a woman assumes on her marriage the domicil of her husband (*f*). How far she may afterwards be able to choose a new domicil for herself, and under what circumstances such a choice will be recognised, is not altogether clear.

According to the *dicta* of Lord Cranworth (*g*), in

- (*a*) *Hodgson v. De Beauchesne*, 12 Moo. P. C. 285.
- (*b*) *Attorney-General v. Pottinger*, 30 L. J. Ex. 284; *Craigie v. Lewin*, 3 Curt. 435.
- (*c*) *Hamilton v. Dallas*, L. R. 1 Ch. D. 257.
- (*d*) *Bell v. Kennedy*, L. R. 1 H. L., Sc. 307.
- (*e*) *Lord v. Colvin*, 28 L. J. Ch. 361.
- (*f*) *Bremer v. Freeman*, 10 Moo. P. C. 306.
- (*g*) 7 H. L. C. 390.

Dolphin v. Robins, founded on the older decision of *Williams v. Dormer* (a), and adopted with approval by Sir R. Phillimore in the recent case of *Le Sueur v. Le Sueur* (b), a married woman is undoubtedly rendered capable of acquiring a domicil distinct from her husband's by a judicial separation. In *Dolphin v. Robins*, Lord Cranworth evinced an inclination to go a step further. "I should add," he says, "that there may be exceptional cases, to which even without judicial separation the general rule would not apply, as for instance, where the husband has abjured the realm, has deserted his wife, and established himself permanently in a foreign country, or has committed felony and been transported. It may be that in these and similar instances the nature of the case may be considered to give rise to necessary exceptions." A similar conclusion is indicated by expressions which fell from Lord Eldon and Lord Redesdale in *Tovey v. Lindsay* (c), and was adopted, as far as wilful desertion by the husband is concerned, by Sir R. Phillimore in the case of *Le Sueur v. Le Sueur* (d) just cited, where he said: "Upon the whole, I am disposed to assume in favour of the petitioner the correctness of the opinion that desertion on the part of the husband may entitle the wife, without a decree of judicial separation, to choose a new domicil for herself; and in coming to that conclusion I am aware that I am going a step further than judicial decisions have yet gone." The petition in that case was dismissed upon another ground, namely, that though the wife, under such circumstances, might elect a domicil of her own, she could not make her husband amenable to the *lex fori* of her new domicil, and that inasmuch as neither his domicil nor the place where the marriage was contracted was in England, the English Court had no jurisdiction to dissolve the marriage; but the principle was clearly indi-

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Domicil of
married
woman—when
distinct.

(a) 2 Rob. Eccl. 505.

(b) L. R. 1 P. D. 139. In *Re Daly's Settlement*, 25 Beav. 456, Lord Romilly had held that a separation *de facto* for thirty years was not sufficient to confer an independent domicil on a married woman.

(c) 1 Dow. 117, 138, 140.

(d) L. R. 1 P. D. 139.

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Residence
necessary by
office.

cated, and may now be regarded as settled. It is hardly necessary to observe, after considering the cases just cited, that a widow resumes on her husband's death the power of electing and changing her domicil as if she were a *feme sole*.

Following the principle which decides the place of a man's domicil by that of his home—for which phrase, indeed, the word may almost be regarded as the legal equivalent—it is established that a foreign domicil is conferred by the acceptance of any office which necessarily requires foreign residence (*a*), even although it may also involve occasional employment in other parts of the world, as in the case of one who enters the military or naval service of a government. This rule requires some modification when applied to the case of such a sovereign power as Great Britain, which includes within its jurisdiction several countries, each able to confer an independent domicil of its own. A Scotchman or Irishman entering the British navy does not thereby acquire an English domicil (*b*), since the British navy is Scotch and Irish as well as English. It is hardly necessary to observe, that unless the residence required by the office is of a constant character, it will not be residence at all in the eye of the law, and no change of domicil will be effected by the acceptance of its duties. An apparent exception to the rule itself is the case of consular office, which arises from the general view taken by international law of the relation between a consul and the State which he represents. A British subject who goes abroad as consul for his country does not acquire a foreign domicil by so doing, nor does the acceptance of a British consulate by one already domiciled abroad confer a British domicil upon the holder (*c*). On the contrary, a foreigner who comes to England as consul for the country in which he is domiciled retains his own domicil *ex officio*,

(*a*) *Munro v. Douglas*, 5 Madd. 379; *Attorney-General v. Pottinger*, 30 L. J. Ex. 284.

(*b*) *Brown v. Smith*, 21 L. J. Ch. 356; *Dalhousie v. M'Douall*, 7 Cl. & F. 817.

(*c*) *Sharpe v. Crispin*, L. R. 1 P. & M. 611.

however long his residence in this country, the rule of international law on this point appearing not to admit of contradiction (*a*). The older cases cited by Mr. Westlake on this subject (*b*) are to the same effect, and the same rule applies *a fortiori* to ambassadors.

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In addition to these presumptions of law, which do not *Indicia of domicil*. admit of contradiction, there are other facts which are accepted as evidence, more or less conclusive, where a difficulty arises in deciding where residence has been fixed. It is a principle of common sense that the place which a man has selected as the home for his wife and family should be regarded, in the absence of evidence to the contrary, as that in which he himself must be considered to reside (*c*). And this, in the case cited, was held to be so, even though the choice of residence was made expressly at the wife's request, and the house taken and furnished at her expense. It is always material, as was said in the Privy Council in a recent case (*d*), in determining what is a man's *domicil*, to consider where his wife and children live and have their permanent place of residence, and where his establishment is kept up. That is the place to which it is to be presumed that the man would go unless incapacitated from doing so by business or public duties. Next to this test or criterion, but subordinate to it (*e*), comes the rule which was laid down in *Somerville v. Somerville* by Lord Alvanley (*f*). In the case of a nobleman or country gentleman, who has two homes in different jurisdictions, as, for example, in the case of a Scotch landowner with a house in Belgravia, who lives half the year in each, the situation of the country house will be preferred to that of the town residence; while, on the other hand, a merchant, whose business lies in the metropolis, shall be considered as having his *domicil* there, and not in the

(*a*) *Niboyet v. Niboyet*, L. R. 2 P. D. 52.

(*b*) *Maltass v. Maltass*, 1 Rob. E. 79; *Heath v. Samson*, 14 Beav. 441.

(*c*) *Aitchison v. Dixon*, L. R. 10 Eq. 589.

(*d*) *Platt v. Attorney-General of New South Wales*, 38 L. T. 74.

(*e*) *Forbes v. Forbes*, Kay, 341.

(*f*) 5 Ves. jun. 750, 789; and see the cases cited from Denisart, at p. 777.

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country. The mere fact that a man marries a native of the country to which he has transferred his residence is *some* evidence that that residence is intended to be permanent, and therefore that a change of domicil has been made (*a*). So it has been held evidence of a change of domicil, more or less cogent when combined with other material facts, that a man should set up a permanent commercial business in a place, and so fix his *rerum ac fortunarum summam* there; that he should obtain naturalization in the new country, or take steps preliminary to doing so; that he should vote at elections there, thus exercising the functions of a resident citizen; that he should accept local office involving the necessity of taking an oath of allegiance to the territorial sovereign; and that he should buy land in the new locality to which he has transferred himself (*b*). The expression of a wish or direction to be buried in either the old or the new country of residence does not seem to be a very important circumstance (*c*); and it would certainly appear unreasonable that a man's natural desire that his remains should rest, for example, in a family vault, which perhaps he has never visited in his life, should affect the view taken by the law of his actual domicil or civil *status* whilst living. The facts cited, and all similar ones, will be accepted as indicating that voluntary change of permanent residence from which the law deduces a change of domicil; but, as has been already said with reference to political exiles, the change of residence must be voluntary. Domicil cannot be founded upon compulsory residence, and there may well be cases in which even a permanent residence in a foreign country, if necessitated by the state of the health, will not operate upon the domicil (*d*). The fact, however, that the *preference* for

(*a*) *Drevon v. Drevon*, 34 L. J. Ch. 129, 135; *Gomez v. Eames*, Prob. Div. 'Times,' July 9, 10, 1878 (not yet reported).

(*b*) *Drevon v. Drevon*, 34 L. J. Ch. 129. For other material facts indicating a change of domicil, see *Whicker v. Hume*, 7 H. L. C. 124.

(*c*) *Platt v. Attorney-General of New South Wales*, 38 L. T. 74; *Douglas v. Douglas*, L. R. 12 Eq. 617.

(*d*) *Hoskins v. Matthews*, 8 De G. M. & G. 13, 28; *Beattie v. Johnson* 10 Cl. & F. 139.

the foreign residence arose from climatic or valetudinarian considerations, will not deprive such permanent foreign residence of its natural effect. In the one case the foreign abode is determined by necessity; in the other, by choice (a).

The variety of the incidents from which a change or retention of domicil may be inferred have now perhaps been sufficiently illustrated. The effects which domicil has in determining what law shall be applied to interpret a man's acts, or to the distribution of his property, do not properly come under the object of this chapter, and will be noticed in the ensuing portions of this treatise, as occasion arises. It may be observed before leaving this part of the subject, that there is a growing tendency to regard the question of domicil as of greater importance than that originally attributed to it, in connection with the kindred question of national character. Every act of legislation which renders it easier for a man to divest himself of or assume a particular nationality at pleasure, and which simplifies the formalities of such a process, makes a further step towards the time when no formality whatever will be required, and when the mere voluntary assumption by the individual of a new domicil will be accepted by the government whose protection he has left, no less than by that to which he has declared his intention of adhering, as equivalent to enrolment among the members of the community of which he has become a member, for all intents and purposes. In the United States, in particular, this view has long been gaining ground (b), as would naturally be expected in a country whose population is so constantly being increased by immigration from older nations; but the principle has never received any recognition in English law, although special provision has been made by the convention between Her Majesty and the American Government of

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Domicil and
national
character,
approximation
of.

(a) *Hoskins v. Matthews*, 8 De G. M. & G. 13, 28, per Turner, L.J.

(b) See Wheaton's Int. Law, 6th ed. p. 132; Story's Conflict of Laws, § 49 b.

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Domicil for
testamentary
purposes.

1871, and the Naturalization (Amendment) Act (35 & 36 Vict. c. 39), referred to in the preceding chapter, for the renunciation of British nationality in favour of that of the United States.

As to domicil for testamentary purposes, or with relation to succession to personal property on intestacy, the law has been considerably modified by 24 & 25 Vict. c. 121, entitled, "An Act to amend the Law in relation to the Wills and Domicil of British subjects dying whilst resident abroad, and of foreign subjects dying whilst resident in Her Majesty's dominions." By this Act it is provided that, subject to future conventions to be made with foreign states in relation to its provisions, British subjects dying in a foreign country shall be deemed for all purposes of testate or intestate succession as to movables to retain the domicil they possessed at the time of going to reside in such foreign country, unless they have resided in such foreign country for a year at least, and shall have made a formal and public written declaration of an intention to become domiciled there (s. 1). Similarly foreigners dying in Great Britain shall not be deemed to have acquired a domicil here unless they have resided within Her Majesty's dominions for the same period previous to their death, and have made a similar declaration of intention (s. 2). It is to be observed that the Act takes no effect of itself, but simply empowers Her Majesty to call its provisions into effect by Order in Council, after a convention has been made with the particular foreign State concerned for that purpose.

Statutory
domicil, objec-
tions to.

It is perhaps doubtful how far it is wise to call into existence a statutory kind of domicil for a particular purpose, or to deny that that is domicil which international law recognises as such. In *Hamilton v. Dallas* (a) it was contended that where a foreign State, such as France, has prescribed certain conditions for the acquisition of domicil within its territories by foreigners, no domicil can be acquired for purposes of succession or testamentary dis-

(a) L. R. 1 Ch. D. 257; *Bremer v. Freeman*, 10 Moo. P. C. 306.

position in that country unless those conditions are complied with. The *Code Napoléon* (Art. 13) gives the right of acquiring a domicil and other civil rights in France only to those foreigners who shall have obtained the authorization of the Government, and cases (a) were cited from the French reports to shew that a *domicil de facto* without such authorization was not regarded as sufficient to confer any of the ordinary results of a domicil recognised by the law. It was, however, held by Bacon, V.C., that whether or not the 13th article of the Code was intended to prevent the acquisition of a domicil in France for the purposes of succession, which was not the opinion of the learned judge, "the fact that a foreigner can acquire a *domicil de facto* in France is not for a moment to be called in question. It requires no provision in the Code for that; it is a law paramount to the law of the Code, not provided against nor provided for in the Code, but a natural and national right against which there is no interdiction or prohibition." There can be no doubt that this view is in accordance with the principles of international law. Statutes which attempt to cut down or enlarge the natural capacity of every adult to acquire a domicil by the requisite *animus* and *factum*, do nothing in reality towards taking away or conferring domicil, strictly so called. What they really effect is an alteration in the purposes for which the test of domicil is applied by the legislature that passes them; and to declare that something less or something more than domicil, as the case may be, shall in the courts of that legislature decide questions which private international law refers to domicil alone. This is one of the very points of difference between nationality and domicil, to which Lord Westbury calls attention in *Udny v. Udny* (b). "The political *status* may depend upon different laws in different countries; whereas the civil *status* is governed universally by one single prin-

(a) *Melizet's Case*, Dalloz. 1869, i. 294; *Sussman's Case*, Dalloz. 1872, ii. 65; *Forgo's Case*, Cour de Cass. May 4, 1875.

(b) L. R. 1 H. L., Sc. 441, 457.

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ciple, namely, that of *domicil*, which is the criterion established by law for the purpose of determining civil *status*. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy, must depend." For *international* purposes, except where regulated by special convention between special States, as provided by 24 & 25 Vict. c. 121, it would follow from this reasoning that municipal legislation purporting to limit or to enlarge the natural power of acquiring a *domicil* within the dominion of such legislation, should be disregarded. The same question that was decided in *Hamilton v. Dallas* (*a*) had already been determined by Lord Wensleydale in *Bremer v. Freeman* (*b*), but in that case the judgment went rather upon the intended scope and proper construction of the French law, and not so distinctly upon the paramount nature of the natural right. In any event, a *domicil* so conferred by the statutes of one particular State would clearly not be entitled to *international* recognition, and the inconveniences of a double *domicil* would at once be introduced. That a man can have but one *domicil* for the purposes of succession was clearly laid down by Lord Alvanley in *Somerville v. Somerville* (*c*), and the principle has received the fullest recognition since that decision (*d*).

Mercantile
domicil in
time of war.

The subject of that mercantile *domicil* or quasi-*domicil*, which is peculiar to a time of war, does not properly come within the scope of the present treatise, but it may be useful to advert to it here. Popularly speaking, it is sometimes said that the character of private property on the high seas in time of war is decided by the mercantile *domicil* of the owner. It is more correctly stated by Wheaton, that a man's property may acquire a hostile character, independently of his personal residence or

(*a*) L. R. 1 Ch. D. 257.

(*b*) 10 Moo. P. C. 306; see also *Collier v. Rivaz*, 2 Curt. 855; *Anderson v. Lanenville*, 9 Moo. P. C. 325.

(*c*) 5 Ves. 756.

(*d*) *Crookenden v. Fuller*, 29 L. J. P & M. 1; *Munro v. Munro*, 7 Cl. & F. 842; *Hodgson v. De Beaufchesne*, 12 Moo. P. C. 285.

nationality (a). Thus, if a man carries on trade from a hostile port, as a merchant of that port, his property engaged in enterprises which have originated from that port will be regarded as in hostile ownership (b). A man may thus have mercantile concerns in two countries, and if he acts as a merchant of both, he must be liable, in a prize court, to be considered as a subject of both, with regard to the transactions originating respectively in those countries (c). Nor is it necessary, in order to make a man a merchant of any place, that he should have a counting-house or fixed establishment there; if he is there himself from time to time, and acts as a merchant of the place, it is sufficient (d); though he may of course avoid this liability upon the outbreak of war by withdrawing from and putting an end to the trade he has hitherto carried on (e).

SUMMARY.

Domicil is that relation of an individual to a State or country which arises from residence within its limits as a member of its community. In ordinary language, that country is said to be the country of his *domicil*, and he is spoken of as *domiciled* within it.

Every individual is regarded by the law as *domiciled* in some one country at every period of his life, and can pp. 8, 9. only be *domiciled* in one country at a time.

A *domicil* spoken of as the *domicil of origin* attaches to every individual at his birth. In the case of posthumous or illegitimate children, the *domicil of origin* is the *domicil* of the mother at the time of the birth; in all p. 9. other cases it is regarded as derived from the father. (The possible cases in which the *domicils* of the father and mother may be different have been already mentioned (f)).

- (a) Wheaton (Dana), § 834.
- (b) *The Indian Chief*, 3 C. Rob. 12; *The Portland*, 3 C. Rob. 41; *The Susa*, 2 C. Rob. 255.
- (c) *The Jonge Klassina*, 5 C. Rob. 297, 302.
- (d) *Ibid.* p. 303, 304.
- (e) *The Portland*, 3 C. Rob. 41: *The Indian Chief*, 3 C. Rob. 12.
- (f) *Ante*, p. 17.

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pp. 9, 10.

The domicil of the child continues through legal infancy to be that of the parent from which it was derived, and follows the changes of the latter. An infant who marries and changes its home must, for this purpose, be regarded as *sui juris*.

p. 10.

The domicil of an orphan becomes and follows that of its legal guardian. It is, however, doubtful whether a guardian by changing his own domicil can so alter that of the minor as to affect the right of succession to the minor's property, at any rate when there is a fraudulent or self-interested intention that it shall be so affected.

The domicil of origin adheres until a new domicil is acquired.

pp. 10-12.

The domicil of origin is changed, in the case of a person *sui juris*, by a *de facto* removal to a home in a new country, with an *animus non revertendi* and an *animus manendi*; or in the case of a woman, by marrying a man whose domicil is different from her own.

A domicil which is not the domicil of origin, but has been acquired, is lost by actual abandonment, *animo non revertendi*. Until a new domicil is acquired, the domicil of origin temporarily reverts.

When an acquired domicil has thus been divested, a new domicil is acquired by complete transit to a new country, and the establishment there, *animo manendi*, of a home.

pp. 12-16,
18-21.

The *animus manendi* or *non revertendi* is a question of fact for the Court, as to which neither a declaration *ante litem motam*, nor an affidavit *post litem motam*, by the person whose domicil is in question, is conclusive, though all such statements are evidence to be taken into consideration.

p. 16.

The *animus manendi* will in certain cases be a presumption of law which will not admit contradiction.

pp. 17, 18.

The domicil of a married woman becomes and follows that of her husband, but in the event of his death, of a divorce, or of a judicial separation, she becomes re-invested with the power of acquiring a new domicil of her own.

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The same result may probably be regarded as following from certain exceptional circumstances, such as desertion by the husband.

Domicil, for the purposes of succession to movable property, testate or intestate, is further regulated by 24 & 25 Vict. c. 121. By this Act it is provided, that, subject to conventions to be made with foreign States for its reciprocal application, British subjects dying in a foreign country shall be deemed, for all purposes of testate or intestate succession as to movables, to retain the domicil they possessed at the time of going to reside in such foreign country, unless they have resided in such foreign country for a year at least before the death, and shall have made a formal written declaration of an intention to become domiciled there. Similar provisions are made with regard to the subjects of foreign States dying in Great Britain.

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PERSONS.****CAP. III.****CHAPTER III.****CAPACITY.**

Capacity and incapacity, theories as to. THE question of the capacity, or rather the incapacity, of persons, is one of which it is difficult to gather anything like a satisfactory view from the isolated decisions on the subject to be found in English law. All individuals, about whom nothing more is known than that they are members of a particular community, are presumed by the law to be as *capable* of regulating their own actions, entering into contracts, and disposing of their own property, as their neighbours. Infants, however, and persons of unsound mind, are regarded in every civilized country as labouring under a certain *incapacity*, for most of these purposes; and the declarations of this incapacity, which are made by the law properly claiming jurisdiction in the matter, may be regarded as stamping a certain mark upon the person for the information of other tribunals and communities. How far this mark will be regarded by them, or in other words, how far the declarations of incapacity made by a foreign law are to be recognised as valid and binding, is a branch of international jurisprudence upon which little agreement is to be found. The conflicting opinions of the jurists may be perhaps conveniently regarded under two main heads, directly opposed to each other; the first springing from the theoretical division of all laws into *real* and *personal* (*a*). The writers of this school agree in con-

(*a*) A distinction formulated, probably for the first time, by Bartolus, in the 14th century, who classified statutes as *real* and *personal*, according to the arrangement, obviously often accidental, of the subject and predicate in the enacting sentences.—*Bart. Cod. I. 1.*

sidering that personal laws, or laws directed *in personam*, impress certain fixed qualities upon the person, which adhere to it wherever it is removed and must be recognised by the tribunals of all jurisdictions alike. This personal law, according to Hertius (*De Coll. Leg.* § 4), is the law of that State to which the person is subject by *domicil*, and extends not only to the acts of the individual, wherever done, but to his dealings with property, real as well as personal, wherever situate. Boullenois (a), Bouhier (b), Rodenburg and P. Voet (c) (the last-named, however, distinguishing between the operation of the principle with regard to *real* and *personal* property) lay down a similar rule. As to the question how far a change from the *domicil* of origin may alter the qualities which have been once impressed by the proper *domiciliary* law, the views of the older jurists are so conflicting that there is little object in quoting from them.

The theory exactly opposed to that of which mention has just been made, is that which denies to the laws which regulate the capacity and *status* of persons subject to them any extra-territorial operation whatever. Such laws are, according to this view, the mere eyes by which the legislature sees the persons who come under its notice, and can only present one kind of image to its perception. This theory has been by no means so generally adopted as the former one, and the younger Voet (d) is perhaps its best known advocate. It is obviously capable of being modified into one more in accordance with the views of English jurisprudence, namely, that the tribunals of one State, when considering acts done within the limits of another by persons there domiciled, will refer to the laws of that other State all questions of the capacity of the persons in relation to those acts, but will not allow the foreign laws in question so to operate as to come into collision with their own regulations for persons properly their subjects.

A departure from both these theories is to be seen in

(a) Boullenois, *Princ. Gen.* pp. 4, 5, 6. (c) P. Voet, *De Stat.* § 4, ch. 2.
(b) Bouhier, *Cout. ch.* 23. (d) Voet ad *Pand. I.* iv. 7.

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the French law on the subject (Code Civil, Art. 3) which provides that all questions of *status* and *domicil*, in the case of French subjects, even though domiciled abroad, shall be referred to French law as the law of their nationality; but the view more commonly adopted on the continent is that which regards the *domiciliary law* as the one properly applicable.

Incapacity distinguished from prohibition.

The views hitherto taken by English law of the question of capacity are somewhat perplexing, a state of things for which the loose and inaccurate extension of the term beyond its proper meaning is perhaps responsible. It has already been said that the word can mean nothing more in strictness than the normal and ordinary condition of all human beings. To say that a man is of full capacity is to say simply that he is of full age, and is in full possession of his faculties. Superadded to this meaning comes a purely conventional one, whose effect becomes intelligible only by observing its negations. This supplementary meaning of the word signifies that the person, whose capacity is under consideration, is not the subject of any of the prohibitions or deprivations of the laws which actually govern him and his actions. More accurately, that he is not affected by the deprivations and prohibitions of law otherwise and more stringently than the other reasonable adults by whom he is surrounded. Where a deprivation or a prohibition is general in its effect, it imposes no incapacity upon any one. It does, however, occasionally happen that a prohibition, which is in reality universal, is apparently particular; and that a man is prohibited from a complex act which seems at first sight to be one permissible to others. For example, A. wishes to marry B., his deceased wife's sister, but the English law prohibits him from doing so. Inasmuch as C., D., E., and all the rest of the alphabet may marry B., if they and she like, A. may be said, in a certain loose sense of the term, to be incapacitated by English law from that act. Strictly speaking, this is incorrect. Marriage with a deceased wife's sister, the act in A.'s mind, is *universally* prohibited

by English law, and neither A. nor anybody else may do it. It is true that any other man not similarly related to her may marry B., but if any other man married her, he would not be doing that prohibited act which A. desires to do. A.'s capacity, therefore, is not in any way affected by the prohibition. It will be seen, however, that the distinction between a prohibition and an incapacity is sometimes sufficiently fine to involve a certain amount of confusion.

On the question of *capacity* in the strict sense of the term, *i.e.*, the capacity of a sane adult to do a lawful act, the English authorities, though scanty, have not hitherto been discordant. According to Burge (*a*), Story (*b*), and Westlake (*c*), the *law of the place where an act is done, or a contract entered into*, is the proper law to decide all questions of minority or majority, competency or incompetency, and in fact all matters of *status* and capacity whatever. On the question of the full age which enables a man to bind himself by a contract, Lord Eldon held the same at *Nisi Prius* (*d*). In *Ruding v. Smith* (*e*), which was eventually decided upon a different principle, the opposite view was strongly pressed upon Lord Stowell, who expressly guarded himself against being supposed to accept it. "I do not mean to say," he observes in his judgment, "that Huber is correct in laying down as universally true, that '*personales qualitates, alieni in certo loco jure impressas, ubique circumferri, et personam comitari*,' that a man, being of age in his own country, is of age in every other country, be the law of majority in that country what it may." And in *Sinonin v. Maillac* (*f*), Sir Cresswell Cresswell says clearly, "In general the personal competency or incompetency of individuals to contract has been held to depend upon the law of the place where the contract was made."

These authorities are at any rate sufficiently cogent to render rather startling a *dictum* of the Court of Appeal, in

(*a*) Burge, Col. Law, i. c. 4, p. 132.

(*b*) Story, Conf. of Laws, § 103.

(*c*) Westlake, § 401.

(*d*) *Male v. Roberts*, 3 Esp. 163.

(*e*) 2 Hagg. Cons. 371, 389.

(*f*) 2 Sw. & Tr. 67 (1860).

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the *lex domicili*.

the recent case of *Sottomayor v. De Barros* (*a*), where it was said to be "a well-recognised principle of law," that the question of personal capacity to enter into any contract was to be decided by the law of domicil. The question in that case was simply of the validity of a marriage entered into in England between two Portuguese first-cousins, prohibited, like all other first-cousins, from intermarrying by the law of Portugal. According to the analysis of the word "capacity," which has been attempted above, this was not a question of capacity at all, but of the legality of an act; and it will be shewn when discussing the subject of contract (*b*), that the so-called marriage contract, if a contract at all in the eye of the law, is a contract of a very different nature from that between vendor and purchaser, master and servant. On the question, therefore, of the legality of a marriage prohibited by a certain law, a *dictum* as to the personal capacity of a man to contract was doubly superfluous, especially as it will be seen below (*c*) that the decision could in fact have been supported on a sound foundation of less questionable material. Nevertheless, as the most recent utterance of the English Court of Appeal on the subject now under consideration, it cannot, of course, be disregarded. The actual decision in *Sottomayor v. De Barros* by no means requires that it should be extended to contracts in the sense of commercial agreements, and it is to be hoped that the mist it has thrown over this particular branch of the subject will soon be dispelled. It has just been said that the cases turning on the so-called capacity to contract marriage are not properly cases involving capacity at all. Their consideration will therefore be postponed for the present (*d*), and the decision in *Sottomayor v. De Barros* has only been referred to for the sake of the *dictum* which has just been shewn to be at least questionable. Except so far as that *dictum* may be regarded as qualifying it, the rule as to the capacity of a person to do

(*a*) 37 L. T. 415.

(*b*) *Infrà*, Chap. VIII. (ii.) (a).

(*c*) *Infrà*, pp. 48-53.

(*d*) *Infrà*, Chap. VIII. (ii.)

an act or enter into a contract appears clearly enough to be, that the law of the place where the act is done or the contract entered into must prevail. The capacity of a married woman to contract in her own name depends of course upon the law which governs the relation created by the marriage, i.e., the law of the matrimonial domicil. The decision in *Guepratte v. Young* (a), which appears at first sight from the head-note to be an authority for referring capacity to contract to the law of the domicil, is not so in reality. In that case not only was the locality where the marriage was celebrated, and where the husband had his domicil, French; but the husband and wife had before marriage, by the nuptial contract itself, adopted the provisions of the Code Civil as the basis of their matrimonial rights (*pour base de leur association conjugale*), with elaborate provisions as to the allotment of the dotal property. The question was not, therefore, whether Madame Guepratte had capacity to contract in England, in the proper sense of the word, but whether the nuptial contract, which defined the effect to be given to the marriage upon the property of the contracting parties, allowed or authorized her to do so. Marriage itself is not a contract in the ordinary sense of the term, but there is in every marriage such an implied contract, providing for the future rights of the parties in each other's goods. Here the ordinary implied contract was formulated in writing, and expressly adopted the Code Civil as its controlling law. The law of France was therefore the proper one to determine, not the capacity of the wife to contract in England, but her right to contract at all.

Next, with regard to questions of pure capacity or incapacity, where there is no act or contract to the law of the place of which the matter can be referred, it appears clear that the law of the domicil of the person should prevail. In such a case there is no law to compete with it but the law of the *forum*, which cannot justly claim to decide anything beyond matters of procedure.

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and remedy. Accordingly, in the case of *Re Hellmann's Will* (a), where a testator, domiciled in England, had devised legacies to children domiciled and resident in Hamburg, the Master of the Rolls held, on the application of the executors, that the age at which the children were to be considered as having attained their majority was to be decided by the law of Hamburg, but refused to recognise the authority which that law gives to the father to receive such legacies as guardian for his infant children. The domicil of the testator being English, and the funds being also in England, the Court was of course justified, from one point of view, in refusing to pay the money over except in the manner contemplated by English law, which governed the will. Nevertheless, it appears at first sight a little inconsistent to have accepted the limit at which natural incapacity ceased as determined by the law of the domicil of the legatees, but to have refused to recognise the powers of guardianship conferred by the same law on the father as a modification of the incapacity which it prolonged. The seeming inconsistency, however, is a natural result of the view taken by English law as to the rights of foreign tutors, curators, and guardians, which will be considered immediately. The decision in *Re Hellmann's Will* is quite in accordance with the leading case of *Doglioni v. Crispin* (b). There, the decision of a Portuguese Court that an Englishman domiciled in Portugal was a *pion*, or plebeian, and not of noble rank, and that his illegitimate son was therefore entitled by Portuguese law to succeed to his personal property *ab intestato*, was accepted and acted upon by the judge of the English Court of Probate, whose decision was confirmed by the House of Lords. It is to be observed, however, that in that case the Portuguese law, being the law of the intestate's domicil, was strictly entitled to regulate *all* the questions connected with the succession to his movable property, the quasi-capacity or *status* of the intestate being only one of them. On the mere question of capacity.

(a) L. R. 2 Eq. 363.

(b) L. R. 1 H. L. 301.

or incapacity, unconnected with any act or contract done in England, some additional authority in favour of accepting the decision of the law of the domicil may be gathered from the judgment of Lord Campbell in *Stuart v. Bate* (*a*), speaking with reference to the Scotch law of majority. The *lunacy* of a person domiciled abroad will seldom be proposed for the recognition of an English Court except under some special statute, the object and scope of which must be considered. In *Ex parte Lewis* (*b*), the fact that a person domiciled in Hamburg had been found a lunatic by the competent court there was held sufficient to make him a lunatic in England within the meaning of 4 Geo. II. c. 10. In the subsequent case however of *Sylva v. Da Costa* (*c*), a person found lunatic abroad under a proceeding in the nature of a Commission of Lunacy was held not to be so within the provisions of 36 Geo. III. c. 90.

Closely connected with the question of the capacity of the person comes that of the powers and rights of those who are appointed by his domiciliary law as the representatives and guardians of his interests. It has been already seen from *Re Hellmann's Will* that these powers and rights will not, in their entirety at least, be recognised in England. This may be regarded as a natural consequence of the proposition that the *lex loci* prevails as to questions of capacity when any act done beyond the jurisdiction of the domiciliary law is in question, since the persons claiming those rights and powers before an English Court can only do so with the view of exercising them in England. Accordingly, it was decided in *Johnstone v. Beattie* (*d*) that foreign tutors and curators have no right or authority in this country, and that the Court of Chancery has jurisdiction to appoint an English guardian of an infant whose presence in England was transient only, and whose domicil and real property were Scotch. Lord Cottenham, in his judgment in that case, called attention to the fact that the

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representatives of incapacitated persons.

(*a*) 9 H. L. C. 467; see also *per* Lord Westbury in *Udny v. Udny*, L. R. 1 H. L., Sc. 457.

(*b*) 1 Ves. Sen. 298.

(*c*) 8 Ves. 316.

(*d*) 10 Cl. & F. 42.

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foreign guar-
dians or
curators.

Court of Chancery, if it recognised foreign tutors as guardians in England, might in effect have to administer foreign laws (p. 113), and denied that any agreement in favour of such a practice was to be drawn from the fact of the *patria potestas* being recognised in the case of foreign children by the English Courts.

"This illustration" (he continues) "proves directly the reverse; for although it is true that the parental authority over such a child is recognised, the authority so recognised is only that which exists by the law of England. If, by the law of the country to which the parties belonged (a), the authority of the father was much more extensive and arbitrary than it is in this country, is it to be supposed that the father would be permitted here to transgress the power which the law of this country allows? If not, then the law of this country regulates the authority of the parent of a foreign child *living* (b) in England, by the laws of England, *and not by the laws of the country to which the child belongs.*"

How much the judgment of the House of Lords in *Johnstone v. Beattie* must be taken to have decided, is well explained by Lord Cranworth in the case of *Stuart v. Bute* (c): "Perhaps it might have been a decision more consonant to the principles of general law to have held in *Johnstone v. Beattie* that every country would recognise the *status* of guardian in the same way as it undoubtedly would the *status* of parent, or of husband and wife (d). But . . . all that was decided there was, that the *status* of guardian not being recognised by the law of this country unless constituted in this country, it was not a matter of course to appoint a foreign guardian to be English guardian, but that that was only a matter to be taken into consideration. That was all that was decided in that case." The principle, however, that the foreign guardian cannot *claim* recognition, appears to be well

(a) *Sembler*, by *domicil*.

(b) The facts of the particular case shew that this word was not here used as equivalent to *domiciled*.

(c) 9 H. L. C. 440.

(d) See *infra*, p. 48, *sq.*

established, and was followed by Lord Cranworth in *Dawson v. Jay* (a), where an application by an American guardian to be allowed to take his ward out of the jurisdiction was refused. So in *Johnstone v. Beattie* it is pointed out by Lord Cottenham as clear that a foreign committee of a lunatic has not, and cannot claim, the same authority in any other country than he has in that where he was appointed. Nevertheless, the appointment of a guardian or committee, by the law of the domicil of the infant or lunatic, will be regarded with respect, if not followed as a matter of convenience, by an English Court, as was pointed out by Lord Cranworth in the passage from *Stuart v. Bute* (b) already quoted. In *Nugent v. Vetzera* (c) Vice-Chancellor Page Wood appointed English guardians of children only transiently present within the jurisdiction, "without prejudice" to the rights of the foreign guardian. And in the subsequent cases of *Mackie v. Darling* (d) and *In re Garnier* (e), the title of a *curator bonis* appointed by foreign law received a partial recognition. The title of such personal representatives of persons under incapacity to the personal chattels of the infant or lunatic in England depends upon the *lex domicilii* as governing the general assignment of movable property from which such title flows (f).

SUMMARY.

Where the *lex loci* of an act or a contract competes with the *lex domicilii* of the person with regard to his capacity, the former prevails.

pp. 31-33.

(Except so far as this rule may be regarded as modified or contradicted by the isolated *dictum* in *Sottomayor v. De Barros*, referred to above, p. 32.)

Where there is no act or contract in any particular place to invite the competition of a *lex loci*, but the question is one of the mere fact of capacity, the decision of the pp. 33-35.

(a) 3 De G. M. & G. 764; *Ex parte Watkins*, 2 Ves. Sen. 470.

(b) 9 H. L. C. 440.

(c) L. R. 2 Eq. 704.

(d) L. R. 12 Eq. 319.

(e) L. R. 13 Eq. 532.

(f) *Infrà*, Chap. VII. (ii.).

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pp. 35, 36.

law of the domicil will be accepted in preference to that of the *lex fori*.

But even though a personal incapacity, as defined by the foreign law of the domicil, be recognised by English law, the *status*, rights, and powers of the persons appointed by that foreign law to supplement that incapacity as guardians, tutors, curators, or committees, cannot claim or expect as a right a similar recognition. No such rights or powers extend beyond the jurisdiction of the law which created them.

p. 37.

The creation of such rights and powers by a foreign law is nevertheless a fact to be taken into consideration by an English Court, which will protect or even be guided by those rights and powers where it may seem expedient.

CHAPTER IV.

LEGITIMACY AND MARRIAGE.

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CLOSELY connected with what has been called capacity is Succession to real or immovable estate. the subject of legitimacy, which generally becomes important in connection with the right of inheritance, and on this question the law of England is peculiar. So far as succession to real estate or immovables is concerned, it was decided in *Doe d. Birtwhistle v. Vardill* (*a*), that the requisitions of both the *lex situs* and the *lex domicilii* must be complied with; in other words, that a man to succeed to English land must be legitimate not only by English law, but also by his *personal* law, or the law of his domicil. According to Lord Cranworth, however, in *Shaw v. Gould* (*b*), the judges in *Doe v. Vardill* inclined to the opinion that for purposes other than succession to real estate, as controlled by the Statute of Merton (20 Hen. III. c. 9), the law of domicil would decide the question of *status* involved. That this was the Scotch law had been already decided by the House of Lords in *Dalhousie v. M'Douall* (*c*) and *Munro v. Munro* (*d*), where it was held that the child of a domiciled Scotchman, born in England before the marriage of his parents, was legitimated by the subsequent marriage of his parents in England, so as to succeed to realty situate in Scotland. It was expressly said in the judgment in these cases (which were argued together) that neither the law of the place of the birth, nor of that of the subsequent marriage, had any bearing

(a) 7 Cl. & F. 895; and as to succession under 3 & 4 Will. 4, c. 106, see *In re Don's Estate*, 27 L. J. Ch. 99.

(b) L. R. 3 H. L. p. 70; 37 L. J. Ch. 433.

(c) 7 Cl. & F. 817.

(d) 7 Cl. & F. 842.

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upon the question, which was decided by the fact that the domicil of the father had been Scotch throughout. In the words of Lord Cottenham, "the question in such cases must be, can the legitimation of the children be effected in the country in which the father is domiciled at their birth? for their legitimacy must be decided by the law of that country once for all." In *Shedden v. Patrick* (a) the question was whether the illegitimate child, born in America, of a domiciled Scotchman who afterwards married the mother, could inherit Scotch land, and it was decided that he could not, as he was an alien by birth, and not a natural-born British subject entitled to take British land under 4 Geo. II. c. 21 (b), which is not satisfied unless a child is legitimate from his birth. Story (Conflict of Laws, § 87 a) cites this case as an authority for the proposition that a person illegitimate by the law of his domicil of birth will be held illegitimate in England. By the law of his domicil of birth Story obviously means "the law of the *place* of his birth," ignoring the principle which would attribute to the child in that case the Scotch domicil of his father, and it is clear that for such an assertion of law there is no warranty in the decision adverted to. Lord Campbell expressly says in his judgment (c), that the question is not whether the child was made legitimate *per subsequens matrimonium*, but whether he was made a natural-born subject of the British Crown, so as to take British land under 4 Geo. II. c. 21. In both of the other Scotch cases cited by Story (d), the domicil of the father of the child whose legitimacy was in question, as well as the place of birth, was English; and they are not therefore authorities for the proposition that the legitimacy or illegitimacy of a child depends in any sense upon the law of the place of his birth, except in cases where that is also his domicil. It has been already pointed out that the domicil will be

(a) 1 Macq. 535; 4 Wils. & S. App. 5, p. 94.

(b) See *suprà*, p. 3.

(c) Macq. at p. 611.

(d) *Munro v. Saunders*, 6 Bligh, 468; and *The Strathmore Peerage Case*, 4 Wils. & S. 89.

determined by the place of birth in some rare cases; but it often, of course, happens that the child inherits the domicil of that place from its father, or if illegitimate and unacknowledged, from its mother.

In English law, though the view seemed at first to be taken that for purposes of succession to movable estate the law of the domicil of the successor should be accepted, this principle has not been supported by recent authorities. It was, indeed, apparently assumed in *Re Wright's Trusts* (a) by Wood, V.C., that the law of the child's domicil was to decide whether she was legitimate, and so entitled to the benefit of a bequest by a testator domiciled in England in favour of the children of the child's actual father, but the facts of that case prevent it from being regarded as a decision on the point. The father of the child in question was a domiciled Englishman at the time of her birth, which took place in France. After the birth of the child the parents married, and the child was therefore legitimated *per subsequens matrimonium* according to French law, *the father having in the interval between the birth and the marriage acquired a French domicil instead of his former English one*. Assuming, as the Court apparently did, that the law of the child's domicil was to decide the point of her legitimacy for the purposes of the will, the question arose whether the child's domicil was French, being that of the father at the time of the marriage, or English, being that of the father at the time of the birth. It was decided that the domicil of the father at the time of the birth was to prevail, and the law of the child's domicil became therefore identical with the law of the domicil of the testator, both being English. The child was accordingly held to be illegitimate, but inasmuch as the law of the domicil of the legatee and the law of the domicil of the testator were not really in conflict, the case cannot be regarded as an authority in favour of the former as opposed to the latter. All that can be deduced from it is that in such cases the

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movable
estate.

(a) 2 K. & J. 595; 25 L. J. Ch. 621.

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Depends on
the law of the
domicil of the
testator.

domicil of the child is that of the father at the birth, and not at the marriage, bastardy, when once created by the competent law, being indelible (a).

The conflict did arise in a subsequent case, and it was then clearly laid down by the same judge who decided *Re Wright's Trusts* that the law of the domicil of the testator must prevail. Words such as "child" or "son" in a will must be interpreted and explained, like all other words, by the personal law of the testator. According to English law, "child" means "child born in wedlock," and therefore in the will of a testator whose domicil is English, the word "child" can receive no other meaning. Consequently it was held in *Boyes v. Bedale* that a bequest in the will of a testator, domiciled in England, to "the child of A.," who was domiciled in France before and after the time of the birth, and there had a natural child, which was by French law rendered legitimate by the subsequent marriage of its parents, could not be claimed by such child, whom the English law still regarded as illegitimate and *filius nullius* (b). Nor is this case, properly considered, at all inconsistent with *Re Hellmann's Will* (c), where the age at which legatees under an English will were to be considered as having attained their majority was referred by Lord Romilly to the law of their domicil. That was a simple question of capacity, which the law of the domicil of the person might be fairly called in to decide in the absence of any English Act or contract to be affected by its decision; but in *Boyes v. Bedale* the point was whether a particular person came under a particular description in the will, and the law to which the construction of the will belonged was entitled to settle it. The variance between the decisions of Lord Hatherley in this case and in that of *Re Wright's Trusts* (d) is more apparent than real. There, the putative father was domiciled in England at the time of the birth, and in France

(a) *Vid. Munro v. Munro*, 7 Cl. & F. 842; *Boyes v. Bedale*, 1 H. & M. 798.

(b) *Boyes v. Bedale*, 1 H. & M. 798; *Goodman v. Goodman*, 3 Giff. 643.

(c) L. R. 2 Eq. 363.

(d) 25 L. J. Ch. 621.

at the time of the subsequent marriage with the French mother, the illegitimate child having been in the meantime born in France; and the case was decided not so much upon the construction of the will, as upon the ground that *neither by the law of the child's domicil nor of that of the testator could the child be regarded as legitimate* (a). If the law of the two had been found to differ, the question would have arisen, which was entitled to construe his will?—a point which is now set at rest by the decision in *Boyes v. Bedale*, just adverted to. And according to a *dictum* of Lord Hatherley in the last-mentioned case (b), legitimacy under the Statute of Distributions would be tested in the same way, so that if an intestate died domiciled in England, no one could take directly or by representation under that statute unless legitimate by English law (c). So where a domiciled Frenchman, but of English birth, devised personality to daughters born in France, and legitimated *per subsequens matrimonium* according to French law, it was held by Stuart, V.C., that the legacy duty payable by them was to be at the rate of 1 per cent., and not 10 per cent., under the Legacy Duty Act (55 Geo. III. c. 184) (d). It did not distinctly appear in this case whether the French law was accepted as the law of the domicil of the testator or of the legatee, but in accordance with the principle of *Boyes v. Bedale*, just adverted to, it must be taken that the former was the *ratio decidendi*. In *Levy v. Solomon* (e) an attempt was made to set in competition with this law, on the same question of legitimation *per subsequens matrimonium*, the laws or customs of a religious sect to which all the parties belonged. The testator, the parents, and the child whose legitimacy was in question, were all Jews domiciled in England, and evidence was offered to shew that the

(a) See Lord Hatherley's explanation of his judgment in this case, in *Boyes v. Bedale*, 1 H. & M. p. 802.

(b) At p. 805.

(c) See *Doglioni v. Crispin*, L. R. 1 H. L. 301; *Thorn v. Watkins*, 2 Ves. Sen. 35.

(d) *Skottowe v. Young*, I. R. 11 Eq. 474; 40 L. J. Ch. 366.

(e) *Malins*, V.C., 24th July, 1877.

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rules of their religion, which they recognised as binding laws among themselves, authorized that legitimation by a subsequent marriage between the parents which it was sought to support. Whether, however, this so-called law was regarded as the law common to the parties, or as a quasi-domiciliary law, the contention was equally untenable. In such matters, the law of the domicil is not regarded because it may be presumed to express the intention of the parties, but because the interests of the general body of the inhabitants of the country in which they live require its adoption. Neither a religious sect nor any other self-constituted body can be permitted to set up a claim to an *imperium in imperio*—the assertion of any other personal law within its domain.

Legitimacy
by *lex domi-*
cili must not
be repugnant
to *lex fori*.

Even if the decision of the domiciliary law of a person on his legitimacy was accepted by the law of a foreign country for any purpose, another condition would have to be complied with; viz., that there should be nothing absolutely repugnant to the law of that foreign country in what it was asked to accept. In *Fenton v. Livingstone* (a), a Scotch case on appeal to the House of Lords, the legitimacy of a claimant to succeed to Scotch land by inheritance was in question. The claimant was the issue of the marriage of a widower domiciled in England with his deceased wife's sister, the marriage having been contracted in England in 1808. At that time such marriages were voidable only and not void by English law, and if proceedings were not taken to declare them null before the death of either of the parties, could not be questioned afterwards. The claimant was nevertheless, though domiciled in England from his birth, held to be illegitimate by Scotch law. "It must be granted," said Lord Brougham, "that the general rule is to determine the validity of a marriage by the law of the country where the parties were domiciled, and in most cases the legitimacy of a party is to be determined by the law of his birth-place and of his parents' domicil. But to this . . . there are exceptions from the

(a) 5 Jur. N. S. 1183 (1859).

nature of the case in which the question arises. Thus in deciding upon the title to real estate, the *lex loci rei sitae* must always prevail, so that a person legitimate by the law of his birth-place, and the place where his parents were married may not be regarded as legitimate to take real estate by inheritance elsewhere Was then the marriage of the respondents' parents such that the law of Scotland could recognise its validity, in dealing with the rights of the issue of it to real estate by inheritance?" (a) Lord Brougham then proceeded to state that, though the marriage could not be questioned in England after the death of the parties, yet it was illegal there, and that the law of Scotland was even more stringent on the point than the law of England. By the Scotch law such a marriage was regarded as incestuous, and as actually amounting to a crime; and therefore, even if the Scotch law could accept the decision of the foreign domiciliary law at all on the question of legitimacy to succeed to Scotch land, it could not do so where the recognition of such legitimacy would be absolutely repugnant to its own principles. So again, it was said by Littledale, J., in *Birtwhistle v. Vardill* (b), that personal *status* does not follow a man everywhere, if its consequences are opposed to the law of the country where he goes, and where it is sought to introduce them. The decision in *Compton v. Bearcroft* (c), the case which first recognised the validity in England of Scotch marriages, was similarly explained by subsequent judicial authority to be that "a Scotch marriage was valid in England, if there was nothing in it contrary to the law of England" (d).

Under 21 & 22 Vict. c. 93, persons domiciled in England, or claiming real or personal estate in England, may obtain from the Court for Divorce and Matrimonial Causes (now from the Probate, Divorce, and Admiralty Division of the High Court under s. 34 of the Judicature Act, 1873) a decree declaratory of their legitimacy or illegitimacy, or

Statutory
declaration of
legitimacy.

(a) 5 Jur. N.S. 1183, 1184.

(b) 5 B. & C. 455.

(c) Bull. N. P. 113.

(d) *Harford v. Morris*, 2 Hagg. Cons. 435.

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of the validity or invalidity of the marriage on which the question turns. Mr. Westlake points out (Private Inter. Law, § 407) that the statute does not interfere with the decisions of *Birtwhistle v. Vardill* (a), and *In re Don's Estate* (b), adverted to above; and that a declaration of legitimacy under it would not enable a man born before wedlock to take English land by descent. In the words of Lord Brougham in *Birtwhistle v. Vardill* (c) giving the effect of the opinion of the judges, "the statute, or rather the common law recognised and declared by the statute, requires something more than mere legitimacy to make an heir to real estate in England—it must be legitimacy *sub modo*—legitimacy and being born in wedlock."

SUMMARY.

LEGITIMACY.

pp. 39, 46.

Legitimacy for purposes of succession to immovable property, including chattels, real, in England is tested both by the English law as the *lex situs*, and by the *lex domicilii* of the inheritor, "Legitimacy" (so by the law of the domicil) alone is not sufficient; "it must be legitimacy *sub modo*—legitimacy, and being born in wedlock."

pp. 41, 42.

Legitimacy for purposes of succession to movable property by devise is tested by the law of the domicil of the testator, that being the only law which has the right to interpret the meaning of such words as "children" in the will. Under a bequest in an English will to the children of A., a person domiciled in a country where legitimation *per subsequens matrimonium* is allowed, the children of A. who have been legitimated in that manner are not entitled to take.

p. 43.

Legitimacy for purposes of succession to movable property *ab intestato* is similarly tested by the law of the domicil of the intestate. (Direct authority wanting, but established by *dicta*.)

(a) 7 Cl. & F. 895.

(b) 27 L. J. Ch. 99.

(c) At p. 954.

Legitimacy for the purpose of estimating legacy and succession duty on movable property is decided by the same rules.

[By the Scotch law, legitimacy for purposes of succession generally, other than succession to real estate, is referred to the law of the domicil —i.e., the domicil of the father at the time of the birth. In cases of legitimation *per subsequens matrimonium*, a change in the domicil of the father after the birth and before the marriage is immaterial. The law of the domicil at the time of the birth decides once for all whether the child's bastardy is indelible or provisional only. Such legitimation, according to the law of domicil, will not however render a child born abroad, of a Scotchman by domicil and nationality, a natural-born British subject entitled, under 4 Geo. II. c. 21, to hold British land.]

Legitimacy for purposes other than succession under a will or *ab intestato* has not hitherto come in question, but the *dicta* point to the acceptance of the law of the domicil of the person on the point. The domicil of the person for such purposes is the domicil of *the father at the time of the birth*, as distinguished from the domicil of the place of birth, or of the father at the time of the subsequent marriage.

But legitimacy by the law of the domicil will not in any case be accepted, either by Scotch or English law, if its acceptance involves the recognition by that law of the validity of a marriage which it regards as incestuous or criminal.

MARRIAGE.

The question of what law must be applied to test the validity or invalidity of a marriage is so intimately connected with this part of the subject, that it is convenient to discuss it here, though not coming under the heading of *status*, strictly speaking. It will be necessary to consider, first, what law decides whether the marriage has been validly contracted; and secondly, what law decides,

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Validity of marriage *ab initio*—forms tested by the *lex loci*, essentials by the *lex domicilii*.

in the case of attempted divorce, whether it has been effectually dissolved.

(a.) With regard, in the first place, to the validity of the marriage when entered into, it was clearly laid down in *Brook v. Brook* (*a*) by Lord Campbell, that the *essentials* of a marriage contract were to be regulated by the *lex domicilii*, the *forms* by the *lex loci celebrationis*. The difference between essentials and forms in such a matter would naturally seem to be that between prohibitions that forbid, and prohibitory directions which merely impede, the marriage. This is, in fact, the result of the modern cases, which at first sight seem rather contradictory, on the subject. If the parties can, by complying with certain regulations or obtaining the consent of certain people, intermarry in the country of the matrimonial domicil, the performance of those conditions will not be required by an English Court, which will recognise the marriage as valid, provided the ceremonials and preliminaries required by the law of the place of celebration have been complied with. If, on the other hand, the parties are forbidden by the law of the domicil to intermarry at all, they cannot, except by a change of domicil, escape from that prohibition. The matrimonial domicil being the place where the law presumes that the parties intend to spend their married life, the propriety of this rule is obvious. Most of the cases were thought to involve a question of capacity, and have been referred to under that heading (*b*). It will be necessary, however, briefly to enumerate them here.

The case of *Brook v. Brook* has already been referred to. That was the marriage of a man with his deceased wife's sister, both parties being domiciled in England, and having gone to Denmark, where such unions are permitted, for the purposes of celebration. It was not, as has been pointed out, decided that they were *incapable* of marrying; but that they were *forbidden* by the law of their domicil to do so, and that the marriage was therefore illegal.

(*a*) 9 H. L. C. 193.

(*b*) *Ante*, p. 32; see also *infra*, Chap. VIII., "Capacity to contract."

Lord Campbell, laying down that the *essentials* of a marriage were to be governed by the *lex domicili*, rightly decided that such illegality was an essential, and that there had been in the eye of the law no marriage at all. It should be observed that the parties, according to English law, could not intermarry, whatever forms or preliminaries they fulfilled, and the case therefore differs entirely from those later ones in which it has been held that parties, forbidden to marry by the law of their domicil without certain consents and authorizations, may nevertheless do so in England, provided the English forms are complied with. The principle of *Brook v. Brook* was followed in *Mette v. Mette* (a), the marriage of an alien domiciled and naturalized in England with his deceased wife's sister being similarly held void. The case is only noticeable because the man's English domicil was acquired, and not that of his birth, which of course does not affect the real principle. Still it should be observed that the marriage was in that case valid both by the law of the place of celebration and by that of the domicil of origin, the law of the actual domicil at the time of the marriage being alone regarded.

The earlier case of *Conway v. Beazley* (b) was not in reality a decision as to the validity of a marriage (though apparently so), but as to the validity of a divorce. The head-note, no doubt, enunciates that the *lex loci contractus* will not prevail when either of the contracting parties is under a legal incapacity by the law of his domicil; but in reality there was no question of capacity or incapacity in the case. The "incapacity" depended upon the simple fact, whether the husband was or was not already married at the time of the marriage which it was sought to annul; and it was undeniable that he was already married, in the eye of the English law, unless a Scotch divorce was to be held by English law competent to dissolve a marriage previously celebrated in England. Such a pro-

Validity of
marriage, *ab
initio*—cases
illustrating.

(a) 28 L. J. Prob. 117.

(b) 3 Hagg. Ecc. 689.

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position was untenable, as will be presently shewn (*a*), and the second marriage was therefore rightly declared void.

In *Sinonin v. Maillac* (*b*), a conflict between the *lex domicilii* and the *lex loci celebrationis* directly arose, with regard to the preliminaries to marriage required by the former. The marriage which it was sought to dissolve was one celebrated in England between French subjects domiciled in France without the formal consents required by the French law. Sir Cresswell Cresswell decided that the marriage was valid, chiefly on the ground that the personal competency or incompetency of individuals to contract depends upon the law of the place where the contract is made. It has already been pointed out that a more logical view is obtained by regarding the question not as one of the competency of an individual, but of the legality of a marriage. The parties were not prohibited from marrying by the law of their domicil absolutely, but prohibited from marrying without certain preliminaries. Such a prohibition did not touch the *essentials* but the *forms* of the marriage, and these are governed, according to *Brook v. Brook* (*c*), by the law of the place of the celebration alone. It cannot, of course, be assumed that if such a marriage were questioned in the country of the domicil, the law of which required the consents which had been dispensed with, this view would be taken there. The law of the domicil would possibly persist in regarding the preliminaries which it had imposed as *essential*, and assert its right to insist upon them although the marriage was celebrated elsewhere; but as the law of England has now no similar provisions, and imposes no preliminaries but such as it would regard as ceremonial merely, the question has little practical importance for English jurists (*d*). The view, however, which has been suggested above, that all

(*a*) *Infrà*, p. 59; *Lolley's Case*, R. & R. 237; *McCarthy v. Decaix*, 2 Russ. & My. 614; *Warrender v. Warrender*, 2 Cl. & F. 550.

(*b*) 2 Sw. & Tr. 67 (1860).

(*c*) 9 H. L. C. 193.

(*d*) See *Scrimshire v. Scrimshire*, 2 Cons. 395; *Middleton v. Janverin*, 2 Cons. 437; *Compton v. Bearcroft*, 2 Cons. 444.

such consents are ceremonial preliminaries only, was taken in the Irish case of *Steele v. Braddell* (*a*), referred to with approval by the House of Lords in *Brook v. Brook* (*b*): "This was a marriage," says Lord Campbell in that case, "between parties who might, with the consent of parents and guardians, have contracted a valid marriage according to the law of the country of the husband's domicil If the union between these parties had been prohibited by the law of Ireland (the law of the domicil) as contrary to the law of God, undoubtedly the marriage would have been dissolved."

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Sottomayor v. De Barros (*c*), the most recent case on this subject, comes almost exactly within the meaning of the distinction drawn by Lord Campbell in *Brook v. Brook*, just cited. The parties there were domiciled Portuguese, forbidden by Portuguese law to intermarry at all. Sir R. Phillimore, in the Court of first instance, held that their marriage celebrated in England was valid, conceiving himself to be bound by the decision in *Sinonin v. Maillac* (*d*). The Court of Appeal, however, reversed his judgment, holding that as the parties were absolutely forbidden to marry by the law of their domicil, they could not escape from this prohibition by transient presence and celebration in England, and that the possibility of escaping from Portuguese law by a Papal dispensation was immaterial. The wording of the judgment of the Court of Appeal rested on the more than questionable principle (*e*) that the capacity of a person to contract was tested by his personal law; but the distinction between this case and that of *Sinonin v. Maillac* is plain, and the actual result of the decision of the Court of Appeal is clearly in accordance with *Brook v. Brook* (*f*).

Ruding v. Smith (*g*), though one of the earliest cases on this subject, having been decided by Lord Stowell in 1821, has been purposely left for consideration until the

(*a*) Milw. Eccl. Rep. Ir. 1.

(*b*) 9 H. L. C. p. 216.

(*c*) 37 L. T. 415; *Fenton v. Livingstone*, 5 Jur. N.S. 1183.

(*d*) 2 Sw. & Tr. 67.

(*f*) 9 H. L. C. 216.

(*e*) *Ante*, p. 32; *infra*, Chap. VII. (ii.)

(*g*) 2 Hagg. Cons. 371.

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tendency and principles of the modern decisions had been sufficiently indicated. That was a marriage celebrated at the Cape of Good Hope while under military occupation of the British forces immediately after its acquisition, and the ceremony was performed by the chaplain-general under the sanction of the military authorities, according to British forms. Both the contracting parties were British by nationality and domicil. The validity of the marriage was impeached on two grounds; first, that the Dutch law, as the *lex loci celebrazioneis*, prohibited the parties from marrying at their respective ages without the consents of parents and guardians, which had not been obtained; and, secondly, that the ceremony had not been performed according to the forms required by the same law. According to the principles already stated, it will be seen that the *lex loci celebrazioneis* was *prima facie* the law to decide both these questions; but in the particular case there were exceptional circumstances to be considered. By the capitulation of the colony it had been stipulated that the conquered should retain certain privileges, including the enjoyment of their own laws and customs, and Lord Stowell deduced from this that the *lex loci* had been altered for all others except those in whose favour the stipulation was made—that for British domiciled subjects with the British forces, in short, the *lex loci* was in fact British. On this view the decision was not that the *lex domicilii* must prevail in such matters when in conflict with the *lex loci*, but that the law common to the parties had, under the peculiar circumstances of the case, taken the place of the latter. The case of *Harford v. Morris* (*a*), decided in the same year, similarly depended upon the exceptional facts in it, which render it of no authority on the question of the competition of the law of the domicil and that of the place of celebration.

*Marriage must
be that which
the lex fori*

It has thus been seen that the English law still, following the principle of *Brook v. Brook* (*b*), refers the

(*a*) 2 Hagg. Cons. 371.

(*b*) 9 H. L. C. 193.

essentials of a marriage to the law of the domicil. This must, however, be taken subject to the qualification that it will not allow anything to be called marriage, either by the law of the domicil or the place of celebration, which it does not itself recognise as such ; and accordingly, in *Hyde v. Hyde* (a), the Probate and Divorce Court refused to acknowledge a Mormon marriage apparently celebrated in Utah, though both the contracting parties were single at the time of the so-called marriage, and had never assumed to contract another. It was said in that case by the Judge-Ordinary (Sir C. Cresswell) that a marriage in Christendom was an entirely different thing, both in its essence and incidents, from what was called a marriage in a country where polygamy was practised ; and he referred to the case of *Ardaseer Cursetjee v. Perozeboye* (b), where the Privy Council held that Parsee marriages were not within the force of a charter extending the jurisdiction of the Ecclesiastical Court to Her Majesty's subjects in India "so far as the circumstances and occasions of the said people shall require."

There is abundant authority to shew that a marriage, which the English law regards as criminal or incestuous, will not under any circumstances be accepted by it as valid. "The rule," said Littledale, J., "that personal status accompanies a man everywhere is admitted to have this qualification, that it does not militate against the law of the country where the consequences of that status are sought to be introduced" (c). So, in *Harford v. Morris* (d) it was explained that the decisions establishing the validity of Scotch marriages in England simply amounted to this, that a Scotch marriage was lawful in England if there was nothing in it contrary to the law of England. Subject, therefore, to this qualification, that the marriage which the Court is asked to recognise shall be marriage, and not incest or mere illicit intercourse of

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recognises as
such.

Illicit or
incestuous
intercourse
not recognised.

(a) L. R. 1 P. & D. 130.

(b) 10 Moo. P. C. 375, 419.

(c) *Birtwhistle v. Vardill*, 5 B. & C. 455.

(d) 2 Hagg. Cons. 435; *Compton v. Bearcroft*, Bull. N. P. 113; and see *Fenton v. Livingstone*, 5 Jur. N. S. 1183.

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the sexes, it appears clear that the English law refers forms to the *lex loci*, and essentials to the *lex domicilii*; and further, that the only essential question which is practically ever referred to the latter law is this—are the parties permitted by it to intermarry at all? The old cases (*a*) cited by Story (Conflict of Laws, § 79) for the proposition that English law does not recognise the *invalidity* of a marriage celebrated abroad which is pronounced void by the *lex loci*, have been already referred to as not in fact establishing his assertion. It is plain that if English law recognises foreign formalities as *sufficient* for a foreign marriage between domiciled English subjects, it is only a logical consequence to regard them, subject to the exceptions of extra-territoriality (*b*), as *necessary*; and no modern decision throws a doubt upon the consistent application of the principle in future whenever the question may arise. The only difficulty that has ever really arisen has been to decide what are the formalities, and what the essentials of the contract—a difficulty which is now solved, reading *Sinonin v. Maillac* (*c*) and *Sottomayor v. De Barros* together, by regarding everything as a formality for the *lex loci*, except unconditional prohibition.

Colonial mar-
riage with
deceased
wife's sister.

It will be seen that there is nothing in these principles, nor in the decision in *Brook v. Brook* (*d*), to prevent the English law from recognising the validity of the marriage of a foreigner or colonist with his deceased wife's sister, in the country of their common domicil where such unions are legal, unless such a marriage be regarded as an incestuous crime, repugnant to the spirit of English jurisprudence. It is difficult to maintain this proposition, in the face of the fact that colonial statutes recognising the validity of such marriages have repeatedly received the sanction of the Crown. Yet, if such marriages are not to be branded by the law of England as criminal and incestuous, it follows that they are perfectly valid according

(*a*) *Ruding v. Smith*, 2 Hagg. Cons. 390; *Harford v. Morris*, *ib.* 432.

(*b*) See *infra*, Chap. V.

(*c*) 2 Sw. & Tr. 67; 37 L. T. 415.

(*d*) 9 H. L. C. 193.

to the theory of international law which it has just been shewn that English law adopts, and according to the same theory their offspring would be legitimate. In practice, however, they are not so, because the question of their legitimacy, as has been pointed out, almost invariably arises with regard to their right to succeed to movable or immovable property by devise or *ab intestato*, and this right is governed by a new set of considerations: Succession to immovable property, according to *Birtwhistle v. Vardill* (a), demands not only legitimacy by the personal law, but legitimacy by the *lex situs*—i.e., that the persons concerned shall have been born in what the English law calls wedlock, speaking for itself, and not as adopting the principles of international law. In a similar way, the English law interferes with regard to succession to movable property, where the testator or intestate was domiciled in England, as the law of his domicil, and claims to interpret the word “child” or “son” according to its own independent views of what is paternity, and what is wedlock. Thus, whenever succession to immovables or movables is in question, the children of a man by his deceased wife’s sister, married to him in the country of their common domicil where such unions are legal, are bastards, and the marriage itself is regarded as a nullity. When neither the *lex situs* as to immovables, nor the *lex domicilii* with regard to a movable succession, interferes, it has been shewn, subject to the qualifications stated above, that English law regards such a marriage, complying both as to forms and essentials with the law of the domicil of the parties and of the place of celebration, as perfectly valid. It is obvious, for instance, that such a husband, coming to England and contracting a new marriage there in the lifetime of his second wife, would be liable to be indicted for bigamy, though the point has not yet arisen, and possibly never will. The expediency of adhering to legal principles which thus render it necessary to reject the validity of a marriage for certain purposes of comparatively common

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occurrence, and to accept it theoretically for others which are more hypothetical, is at least questionable. It should surely be sufficient for the English law, whether speaking as the *lex situs* of immovables, or as the *lex domicilii* with respect to a movable succession, to follow those maxims of international law which have become part of itself by adoption. The vainglorious conservatism of the feudal maxim "*Nullus princeps legitimat ad succedendum in bona alterius territorii*" (a) might well be satisfied by such a rational interpretation, without insisting that the English law shall for purposes of succession refuse to be content with obedience to those rules, founded on expediency and on the comity of nations, which it professes elsewhere to incorporate with itself. It cannot be too strongly insisted upon that international law is a part of the law of every nation, and it would perhaps be beneficial if English jurisprudence were readier to admit it as such. There is, however, no tendency at the present time to do so, and more than one instance has recently occurred in which it has been held absolutely necessary that international law should receive the stamp of the English legislature before English Courts can acknowledge its existence. The result of the Geneva Arbitration, with the subsequent passing of the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), affords one striking illustration of the view referred to ; and another may be found in the decision of *R. v. Keyn* (b), where it was held in effect that, even assuming that international law conferred on every nation jurisdiction within three miles from its shores, English Courts could not accept or exercise the jurisdiction thus attributed to them without the authorization of an English statute. It is beyond a doubt, therefore, that nothing but an act of the legislature will effect that recognition of the legitimacy of the issue of a colonist married to his deceased wife's sister, which the principles of private inter-

(a) D'Argentré, Comm. Art. 218.

(b) L. R. 2 Ex. D. 63 ; see the statute passed in consequence of this decision in the present session (Territorial Waters Jurisdiction Act, 1878).

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national law do in fact demand, and a bill has been at least once unsuccessfully introduced into Parliament to effect this result. It would no doubt be sufficient to enact, that persons legitimate by the law of their domicil of birth shall be so in England for all intents and purposes whatsoever, including that of succession to real and personal estate ; and it is at least possible that the postponement of such an enactment is only temporary.

The effect of *privilegia*, or laws specially passed with *Privilegia*. reference to one or more individuals, depriving them of the right either of marrying or entering into any other relation permitted to other sane adults, is no doubt to create an artificial incapacity of a particular kind, and for certain purposes. The incapacity, however, being an artificial and not a natural one, cannot demand recognition in other countries ; and the law creating it will be imperative only in the tribunals of the sovereign power by which that law was enacted. The law may direct those Courts to refuse to recognise a marriage contracted in any country by the subject of the *privilegium*, or only to regard as invalid any marriage contracted by him within its territorial jurisdiction. The former has been held to be the proper construction of the Royal Marriage Act (12 Geo. III. c. 11) (a), the judges saying, in answer to a question put to them by the House of Lords, that that statute does not enact an incapacity to contract matrimony within one particular country and district or another, but to contract matrimony generally and in the abstract. It creates an incapacity attaching itself to the person of A. B., which he carries with him wherever he goes. The difference between such an enactment and the ordinary Marriage Acts, which require certain consents as necessary preliminaries to a valid marriage in a certain country, has been already pointed out (b). British Acts of attainer, on the other hand, though they may possibly render the attainted

(a) *The Sussex Peerage Case*, 11 Cl. & F. 85.

(b) *Ante*, p. 48 ; and see *Compton v. Bearcroft*, Bull N. P. 6th ed. 113 ; 2 Hagg. Cons. 443, n. ; *Ilderton v. Ilderton*, 2 H. Bl. 145.

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person incapable of contracting a valid marriage within the dominions of the Crown, do not claim any extra-territorial recognition as to marriages contracted abroad, nor are such foreign marriages regarded as invalid even by British Courts (*a*). “It would be a most revolting conclusion to come to,” says Erle, C.J., in the case cited, “that the marriage of a man, who was capable of contracting in the land in which he was living, with a woman who was born and brought up in that land, and who might even have been ignorant of her husband’s attainer, was invalid, and their children illegitimate, because the man had been attainted before he went abroad. If such were the law, I should not shrink from enforcing it; but I believe that it is not the law of our land, though it is said to be the law of France” (*b*). The more correct view, indeed, appears to be that a British act of attainer does not even incapacitate the attainted person from contracting a valid marriage in England, or, at any rate, that it renders such a marriage voidable merely, and not void (*c*).

SUMMARY.

p. 48-54. Marriage is governed, as to its *essentials*, by the law of the domicil of the parties; as to its *forms*, by the law of the place of celebration.

The law of the domicil of the parties is the proper law to decide whether the marriage can, by the use of any forms, ceremonies, or preliminaries, be effected.

The law of the place of celebration is the proper law to decide what forms, ceremonies, or preliminaries, shall be employed.

If the law of the matrimonial domicil is such that the marriage cannot be effected by obeying its directions, but can be effected by obtaining a dispensation from its pro-

(*a*) *Kynnaird v. Leslie*, L. R. 1 C. P. 389.

(*b*) *Kynnaird v. Leslie*, L. R. 1 C. P. 389; *Vid. Hobby's Case, sub nom. Boreston and Adams*, Noy, 158; 4 Leon. 5; Palm. 19; *Collingwood v. Pace*, 1 Vent. 413; Bridg. 410.

(*c*) *Per Willes, J.*, in *Kynnaird v. Leslie*, L. R. 1 C. P. 389, 400; *Phillips v. Eyre*, L. R. 6 Q. B. 7.

hibitions, the marriage cannot, in the absence of such dispensation, be legalised by the law of the place of celebration.

The law of any country may, and the English Royal Marriage Act does, not only prohibit certain persons from contracting marriage in England except on certain prescribed conditions, but refuse to recognise any marriage contracted by such persons elsewhere when these conditions have not been complied with.

Marriage, to be recognised by an English Court, must be that which is recognised as marriage by Christendom, and not a mere disguise for illicit intercourse or criminal incest.

(b.) *Dissolution of the Marriage.*—Under this head it is necessary to consider, in the first place, what divorces by foreign tribunals will be recognised as valid by English law; and secondly, what marriages the English Court will assume jurisdiction to dissolve. On the first point, the English law is frequently loosely expressed by saying that an English marriage cannot be dissolved by a foreign court or authority, and that any decree purporting to effect such dissolution must be regarded as a nullity (a). *Lolley's Case* (b) is the authority commonly cited in support of this proposition, and as far as regards a marriage celebrated in England, in which the domicil of the husband remains English, it is undoubtedly correct. Unless the parties are *bonâ fide* domiciled under the foreign jurisdiction which assumes to dissolve their marriage at the time of such attempted dissolution, it is quite clear that the English Courts will not recognise the validity of any such divorce. *Lolley's Case*, in which a man who was convicted of bigamy for having married again in England after a Scotch divorce from an English marriage, was followed in *Conway v. Beazley* (c), expressly upon the ground that so long as the parties remain domiciled in England, no

Foreign
divorce has no
effect on an
English
marriage,

at any rate if
the domicil of
the parties is
English.

(a) See, e.g., the judgment of Kindersley, V.C., in *Wilson's Trusts*, L. R. 1 Eq. 247.

(b) 1 Russ. & Ry. 237.

(c) 3 Hagg. Eccl. Rep. 639.

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Scotch divorce of an English marriage can be recognised by English law. Dr. Lushington in that case expressed a strong opinion that the principle which denied recognition to such divorces had no application to cases where the parties were domiciled at the time in the country whose tribunals assumed to divorce them. So, in *Dolphin v. Robins* (a), a Scotch divorce of an English marriage, where the parties were not domiciled in Scotland, but had gone there for a time to found a jurisdiction according to Scotch law, was held invalid (b). And in the more recent case of *Shaw v. Attorney-General* (c), where a woman had left her English husband in England, and, after a residence of two or three years in America, obtained a divorce there, her husband's domicil continuing English, her second marriage in America was held invalid. In none of these cases, however, has it been decided that an English marriage cannot be dissolved by a foreign tribunal, where the parties are, at the time of the divorce, *bonâ fide* domiciled in a foreign state. *M'Carthy v. Decaix* (d) was certainly a decision to that effect, but considerable doubt has been thrown upon the principle involved by more recent *dicta*, and neither in the argument nor in the judgment does any attention seem to have been paid to the fact that the domicil of the husband in that case (where a Danish divorce was held incompetent to affect an English marriage) was Danish throughout. *Warrender v. Warrender* (e) was, it is true, a decision on Scotch law, but the House of Lords there clearly held that it was competent for the Scotch Courts to decree a divorce between parties *domiciled in Scotland*, whose marriage had been celebrated in England. The House of Lords were, however, sitting as a Scotch Court, bound to administer Scotch law (f), and the point has not yet in England been fully decided, unless the case of *M'Carthy v. Decaix*, above referred to,

(a) 7 H. L. C. 390; *Pitt v. Pitt*, 4 Macq. 627.

(b) *Shaw v. Gould*, L. R. 3 H. L. 55; *Tollemache v. Tollemache*, 1 S. & T. 557; 28 L. J. P. & M. 2.

(c) L. R. 2 P. & D. 156.

(d) 2 R. & M. 614.

(e) 2 Cl. & F. 529.

(f) *Ibid.* p. 567.

be accepted as an authority. The English law on the subject is perhaps best summarised by the Judge-Ordinary (Lord Penzance) in *Shaw v. Attorney-General* (a), in 1870. "First," he says, "*Lolley's Case* has never been overruled. Secondly, in no case has a foreign divorce been held to invalidate an English marriage between English subjects where the parties were not domiciled in the country by whose tribunals the divorce was granted. Whether, if so domiciled, the English Courts would recognise and act upon such a divorce, appears to be a question not wholly free from doubt, but the better opinion seems to be that they would do so if the divorce be for a ground of divorce recognised as such in this country, and the foreign country be not resorted to for the collusive purpose of calling in the aid of its tribunals." It may be remarked as to *M'Carthy v. Decais* (b), the decision in which is certainly opposed to the above conclusion, that in 1831, when that case was heard, divorce à vinculo was not granted or recognised at all by the English Ecclesiastical Courts, and the difficulty of admitting the right of a foreign tribunal to dissolve an English marriage, in any event whatever, was of course much greater than it is at present. If the above quotation from *Shaw v. Attorney-General* (c) be compared with the judgment of Lord Westbury in *Shaw v. Gould* (d), it will be seen that it may be taken as giving accurately enough the present state of English law on this question. In the case of *Birt v. Boutinez* (e), before the Judge-Ordinary in 1868, the point did not really arise, as the parties had gone through the ceremony of marriage twice, once in Scotland and afterwards in Belgium (where the husband was domiciled), and the Belgian divorce did not purport to do more than dissolve the Belgian marriage, which according to English law had created no new status between the parties. Nor was the principle at all involved in the case of *Collis v.*

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Foreign
divorce of
English mar-
riage by the
forum domi-
cili.

(a) L. R. 2 P. & D. 156, 161.
(b) 2 Russ. & My. 614.
(c) L. R. 2 P. & D. 161.

(d) L. R. 3 H. L. 80.
(e) L. R. 1 P. & D. 487.

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Hector (a), which only decided that a Turkish divorce had no operation to interfere with the validity of an English marriage settlement between a domiciled Turk and an English lady, though it would have had that effect according to the law of Turkey. The judgment of Vice-Chancellor Hall in that case by no means involved the assertion that the marriage had not been effectually dissolved, but proceeded on the ground that the settlement was an English contract, to be expounded and dealt with according to English law. In the older case of *Ryan v. Ryan* (b), the validity of a Danish divorce of an English marriage was admitted, the husband being domiciled in Denmark, but only for the purpose of granting administration to the widow of a second marriage, no opinion being expressed as to the general principle. The singular case of separation by vows of chastity arose in *Connally v. Connally* (c), and was regarded as a species of consensual divorce, which the Court was evidently inclined to consider must be governed as to its effect and permanence by the law of the domicil of the parties at the time of the separation, and the allegation of the respondent was ordered to be amended that the facts relating to this question might be ascertained. The question of the validity of a foreign divorce, by the tribunal of the domicil of the parties, for grounds not recognised as sufficient by the laws of this country, has not been directly decided in England, though the language of Lord Penzance in *Shaw v. Attorney-General*, quoted above, would lead to the inference that it would not be admitted, nor has there been any English decision as to a supposed distinction arising from the *locus* of the *delictum* on which a divorce has been grounded. On this latter point, however, Lord Lyndhurst intimated in *Warrender v. Warrender* (d), that the English law knew no distinction, notwithstanding a doubt which had been thrown out in *Tovey v. Lindsay* (e) by Lord Eldon.

(a) L. R. 19 Eq. 334.

(d) 2 Cl. & F. 562.

(b) 2 Phill. Eccl. 332.

(e) 1 Dow. 131.

(c) 7 Moo. P. C. 438.

Both of these points are referred by American jurisprudence, to the law of the domicil of the parties at the time the divorce is sought (a).

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Jurisdiction of
English Court
to dissolve
foreign mar-
riages.

English domi-
cile of husband
sufficient to
found jurisdic-
tion.

The second question which arises, with reference to the subject of divorce, is, under what circumstances the English Court will assume jurisdiction to dissolve a marriage not contracted in England, and whether it will in all cases dissolve a marriage which has been so contracted, without regard to the matrimonial domicil at the time its interference is invoked. With regard to the first point, it may be regarded as established that the English Court will dissolve a marriage, without reference to the place where it was contracted, if the domicil of the husband, i.e.—the matrimonial domicil—is English at the time of the petition. In *Brodie v. Brodie* (b), the marriage was celebrated in Tasmania, and the petitioner, who was the husband, had acquired an Australian domicil. It was alleged on his behalf that he had since gained a new domicil in England, and the Full Court regarded it as unquestionable that, if this were established, they would have jurisdiction to dissolve the marriage. Some evidence of the change of domicil was given, and the Court eventually came to the conclusion that the petitioner was "*bonâ fide* resident" in England, so as to give them the jurisdiction contended for. A distinction was drawn in this case between such "*bonâ fide* residence," and strict domicil, the Court remarking that they said nothing as to what the effect of the evidence might have been in a testamentary suit, but that they thought it had been sufficiently established that the petitioner was *bonâ fide* resident in England to entitle him to a decree. For the proposition, however, that something less than domicil is sufficient to give the English Courts jurisdiction to dissolve marriages, or for any other purpose connected with the *lex domicilii*, there is no other English authority of any weight, unless some expressions which fell from the Judge-Ordinary

(a) Story, Conflict of Laws, 280, a.

(b) 2 Sw. & Tr. 259; 30 L. J. P. & M. 185.

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nary in *Yelverton v. Yelverton* (*a*) be relied on, and the decisions of the English Courts as to the validity of Scotch divorces founded on the theory of transient residence, are directly opposed to such a principle. In *Manning v. Manning* (*b*), alluding to this very case, Lord Penzance said : “ I shall forbear to discuss the questions whether there can or ought to be two sorts of domicil; whether a *bonâ fide* residence alone can in any sense be called a domicil, and whether the mere fact of residence ought or ought not to be sufficient to entitle a party to sue in this Court. I will remark in passing, that when the case has been reversed, and the Courts of this country have had to consider how far persons who are domiciled Englishmen shall be bound by the decree of a foreign Matrimonial Court, the strong tendency has been to repudiate the power of the foreign Court under such circumstances to dissolve an English marriage. It would be unfortunate if an opposite course should be followed by the Courts of this country, when they are determining to what extent they will entertain the matrimonial suits of foreigners.” Lord Penzance was able to come to the conclusion in this case that there was not even the *bonâ fide* residence which had been held to be sufficient in *Brodie v. Brodie* (*c*), and dismissed the petition accordingly, so that no direct decision as to the soundness of the distinction was arrived at, but in the subsequent case of *Wilson v. Wilson* (*d*), the same judge expressed his opinion still more strongly on the subject.

English domicil of husband necessary.

“ Whether any residence in this country short of domicil, using that word in its ordinary sense, will give the Court jurisdiction over parties whose domicil is elsewhere, is a question upon which the authorities are not consistent. It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring

(*a*) 1 Sw. & Tr. 574; see also *Burton v. Burton*, 21 W. R. 648, and *infra*, pp. 66, 69.

(*b*) L. R. 2 P. & D. 223.

(*c*) 2 Sw. & Tr. 259; 30 L. J. P. & M. 185.

(*d*) L. R. 2 P. & D. 435, 441.

their matrimonial differences to the courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country, and strangers in another. . . . It is not, however, necessary for me to decide on this occasion whether mere residence, short of domicil in this country, is sufficient to found the jurisdiction of this Court, because I have arrived at the conclusion that the petitioner was, at the commencement of this suit, domiciled in this country." In *Burton v. Burton* (*a*), the petition of the husband was dismissed on the ground that he was not even *bonâ fide* resident in England, just as in *Manning v. Manning* (*b*), and it was therefore not necessary to decide whether any residence short of domicil would be sufficient to found the jurisdiction. It is true that the Judge-Ordinary (Sir J. Hannen) is reported in that case as saying that the jurisdiction would not attach until the husband had taken up his residence in England, but this cannot be taken as an authority by implication for the theory that residence not amounting to domicil would be sufficient in such cases. It may be mentioned that the contrary has, in fact, been held by the Supreme Court of Melbourne (*c*), after a careful review of most of the English cases, and the *dicta* of Lord Penzance in *Wilson v. Wilson*, to which attention has just been called, render it improbable that the theory suggested in *Burton v. Burton* (*d*) will be eventually estab-

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Domicil necessary and sufficient to found jurisdiction for divorce;

(*a*) 21 W. R. 648.

(*b*) L. R. 2 P. & D. 223.

(*c*) *Duggan v. Duggan*, reported in the *Law Times*, Dec. 29th, 1877, at p. 152.

(*d*) 21 W. R. 648; see *Firebrace v. Firebrace*, 26 W. R. 617; *Deck v. Deck*, 2 Sw. & Tr. 90; *Bond v. Bond*, 2 Sw. & Tr. 93.

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blished. English domicil alone will henceforth probably be considered as sufficient and necessary to justify an English Court in interfering with a marriage at the instance of either party to it (*a*). It is quite clear, at any rate, that such English domicil will be regarded as sufficient (*b*), and it has been expressly decided in an Irish case (*c*) that domicil without residence in fact will do for all such purposes. In *Tollemache v. Tollemache* (*d*), the Court decreed at the prayer of the husband, a dissolution of a marriage contracted first in Scotland and afterwards in England. After the marriage the parties principally cohabited in Scotland, and the wife contended that a Scotch decree of divorce already made was valid, and that the Court had not jurisdiction. It was found, however, that the husband still retained his domicil of origin, which was English, and the Court decreed a divorce as prayed, holding that they could not recognise a Scotch divorce of a domiciled Englishman.

but this
essential has
been dis-
pensed with.

It being therefore established that the English Court will assume jurisdiction to dissolve a marriage, whether celebrated abroad or in England, if the matrimonial domicil at the time of the petition is English, it remains to notice more particularly the cases in which it has done so where this condition has not been complied with. In *Deck v. Deck* (*e*) the marriage was an English one, but the husband had since its celebration acquired an American domicil, where he committed adultery. The Court held that it had jurisdiction, and made the decree asked for by the wife, resting their decision on the two grounds that the words of the statute giving them jurisdiction to dissolve a marriage at the instance of the wife in such cases (20 & 21 Vict. c. 85, s. 27) were large enough to include the case before them, and that the respondent, though his

(*a*) See *Firebrace v. Firebrace*, 26 W. R. 617 (*Yelverton v. Yelverton*, 1 Sw. & Tr. 574), and *Niboyet v. Niboyet*, P. D. May, 1878 (not yet reported), a strong decision in favour of the above rule.

(*b*) *Ratcliff v. Ratcliff*, 29 L. J. P. & M. 171.

(*c*) *Gillis v. Gillis*, 8 Ir. R. Eq. 597.

(*d*) 1 Sw. & Tr. 557.

(*e*) 2 Sw. & Tr. 90; 29 L. J. P. & M. 129.

domicil was American, was still a natural-born British subject, and could not shake off his allegiance. Having regard to the expressions of Lord Penzance in *Wilson v. Wilson* (*a*), quoted above, which agree with the almost unanimous views of foreign jurists, and to the view which the English Courts have taken of foreign divorces where the parties have been domiciled in England, it must be admitted that the decision in *Deck v. Deck* is an anomalous one, and it cannot be regarded as an accurate exposition of the present state of the law on the subject. In *Bond v. Bond* (*b*) it did not distinctly appear whether the respondent's domicil was Irish or not, and the Court therefore assumed the required jurisdiction, observing that the case was in substance the same as that of *Deck v. Deck*, which was decided on the same day. *Yelverton v. Yelverton* (*c*) was a suit by the wife for a restitution of conjugal rights, the place of the celebration of the marriage being Scotch and the domicil of the husband Irish, and the Court held that they had no jurisdiction, after a careful examination of the older cases on the subject. It was further held expressly in this case that the wife could not, as a married woman, acquire any domicil other than her husband's under any circumstances, but the later *dicta* as to this have already been examined while treating of domicil (*d*), and it may be now taken that either a judicial separation from or desertion by her husband will enable her to do so (*e*), though it will not entitle her to sue for a divorce in her new *forum*. In *Callwell v. Callwell* (*f*) neither the place where the marriage had been contracted, nor the domicil of the husband, who was the petitioner, was English, but the wife appeared, and so submitted to the jurisdiction of the Court. Had it not been for such submission, it does not appear that the

(*a*) L. R. 2 P. & D. 441.

(*c*) 1 Sw. & Tr. 574.

(*b*) 2 Sw. & Tr. 93.

(*d*) *Vid. supra*, p. 17.

(*e*) *Le Sueur v. Le Sueur*, L. R. 1 P. D. 189; *Dolphin v. Robins*, 7 H. L. C. 390.

(*f*) 3 Sw. & Tr. 259; so in *Zyklinski v. Zyklinski*, 2 Sw. & Tr. 420, *infra*.

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decree which was made in that case could have been supported. With the exception of this case, and that of *Deck v. Deck* (*a*), which has been already commented on, there is no authority for saying that the English Court will dissolve any marriage where the parties are not domiciled in this country, even though it was contracted here. In *Sinonin v. Maillac* (*b*) the Court assumed jurisdiction to inquire into the validity of such a marriage *ab initio*, and refused a decree of nullity, though such a decree had been obtained in France, where the parties had been domiciled throughout. It is obvious, however, that such an inquiry belongs especially to the *forum loci contractus*, and it would be a very different thing for an English Court to assume to dissolve a marriage, for causes arising after its celebration, where the matrimonial domicil was foreign, merely on the ground that it had been originally celebrated in this country. The decisions, however, of the English Courts in cases where the circumstances have been reversed, and they have been called upon to consider the validity of divorces by decrees of foreign Courts where the matrimonial domicil has remained English, are all in point in considering the present question, and have already been discussed in their proper place. The words, however, of Lord Penzance in *Shaw v. Attorney-General* (*c*) are deserving of attention in connection with this subject. "No case," he says, "has ever yet decided that a man can, according to the laws of this country, be divorced from his wife by the tribunals of a country in which he has never had either domicil or residence. He has never submitted himself, either directly or inferentially, to the jurisdiction of such a Court, and has never, by any act of his own, laid himself open to be affected by its process, if it never reaches him. A judgment so obtained has, therefore, in addition to the want of jurisdiction, the incurable vice of being contrary to natural justice, because the proceedings are *ex parte* and take place in the absence of the

(*a*) 2 Sw. & Tr. 90.(*b*) 29 L. J. P. & M. 97.(*c*) L. R. 2 P. & D. 156.

party affected by them." And in accordance with this reasoning it has been held that if a husband whose jurisdiction is foreign appear unconditionally to a petition in the Divorce Court, and take a practical step in the cause, or by obtaining further time to answer, he cannot afterwards contest the jurisdiction, but must answer to the merits. Under such circumstances his proper course would have been to have appeared under protest (a).

Since the preceding pages were written the principles laid down in them have been confirmed by the case of *Niboyet v. Niboyet* (b), in which Sir James Hannen refused to entertain a petition for divorce against a French consul, who had for many years resided in England, but had retained his French domicil by virtue of his international office. It may, therefore, now be regarded as settled that nothing short of domicil will found the jurisdiction. The fact that the husband had on a previous occasion himself appealed to the English Court for a divorce, though the proceedings had been afterwards abandoned, was held insufficient, in the same case, to warrant the Court in assuming jurisdiction over him.

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Result of the
later cases.

SUMMARY.

DISSOLUTION OF MARRIAGE.

Where a marriage has been celebrated in England, and the domicil of the parties is British, a foreign divorce pp. 59, 60. purporting to dissolve it will in no case be recognised.

When the parties to such a marriage were domiciled abroad at the time of its celebration, and the law of the same continuing domicil purports to divorce them, the better opinion seems to be that an English Court would p. 61.

(a) *Zyclinski v. Zyclinski*, 2 Sw. & Tr. 420; and see also *Callwell v. Callwell*, 3 Sw. & Tr. 259.

(b) P. D., May, 1878 (not yet reported), thus overruling the suggestion in *Firebrace v. Firebrace* (26 W. R. 617) that the Court might possibly assume jurisdiction to dissolve the marriage tie where the husband's domicil was foreign, though it would not decree restitution of conjugal rights under similar circumstances.

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pp. 61, 62.

pp. 63-66.

pp. 67-69.

recognise and act upon such a divorce, if granted for a cause of divorce recognised in this country. (But see *contrà, M'Carthy v. Decaix*, 2 Russ. & My. 614.)

The same principle would accord the same recognition to a foreign divorce granted by the law of the domicil, where the domicil of the parties had been English at the time of the marriage, and had been subsequently changed. (But see the same case, *contrà*.)

Where a marriage has been celebrated abroad, an English Court will assume jurisdiction to dissolve it if it can be shewn that the matrimonial domicil is English at the time of the application.

But it appears to be now settled, that nothing less than a domicil in England will found this jurisdiction, although in one case (*Brodie v. Brodie*, 2 Sw. & Tr. 259) it was implied that residence not amounting to domicil would do ; and in another, even more questionable, where the matrimonial domicil was originally English, but had become American, the Court dissolved the marriage on the ground of the original English domicil and continuing British allegiance (*Deck v. Deck*, 2 Sw. & Tr. 90). So, it would seem, the Court may exercise its jurisdiction, notwithstanding the want of an English domicil, if the respondent submit by appearance, and taking practical steps in the cause, though a former submission in another cause is not sufficient.

CHAPTER V.

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CAP. V.

ARTIFICIAL AND CONVENTIONAL PERSONS, INCLUDING
FOREIGN CORPORATIONS, STATES, SOVEREIGNS, AND
AMBASSADORS.(i.) *Foreign Corporations.*

THE principle that laws are commands addressed to *persons*, Persons and which has been referred to above (a), renders it important corporations. to consider what entities come within that term. That corporations created by statute or charter of the British Crown are for most purposes "persons" within the contemplation of the law, has long been decided (b); and Order LXIII. of the Judicature Acts, 1873 and 1875, recognises the same principle by enacting that the word "person" shall, in the construction of the Judicature rules, unless there is anything in the subject or context repugnant thereto, include a body corporate or politic. Postponing for the present the discussion of the rights and liabilities in an English Court of independent Sovereign States, which are clearly designated by the phrase "bodies politic," it will be useful to consider how far a corporation not created by British statute or charter may be considered as a body corporate or person, and in what respects its position in an English Court may be regarded as peculiar.

It is plainly only by a legal fiction that a corporate Artificial body, being an abstract and intangible creation of the personality. law, can be regarded as a person at all. This has given rise to doubts whether the personality so created can or

(a) *Ante*, p. xiv.(b) See authorities cited in *Grant on Corporations*, p. 4, n. (s).

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*Foreign
Corporations.*

Right of a
foreign
corporation
to sue.

ought to be recognised in the courts of any other legislature than that which created it—whether, in fact, Great Britain or any other State has a right to create artificial persons which the Courts of other countries shall be bound to recognise. It is obviously only by a comity of nations, in the strictest sense of the word, that this recognition can be given. The courts of all countries are open *prima facie* to natural persons, and to no others; and an intangible body, which claims to possess a certain unity and individuality of its own by the law of a foreign State, cannot claim as of right, to be treated, beyond the jurisdiction of that State, on the footing of an ordinary rational human being. Such recognition, in fact, could only be accorded between States whose systems of jurisprudence were characterized by the same general conceptions, and who had reached, approximately speaking, the same stage of civilization. It would be impossible, unless these conditions were complied with, that the ordinary attributes of a person, such as domicil and capacity, could be consistently applied to these creations of a foreign law; and unless a foreign corporation which claimed our recognition was, by the law of the State which created it, substantially the same thing as a corporation created by statute or charter here, we should be unable to recognise it at all (a). The principle that a foreign corporation may sue as plaintiff by its corporate name in an English court was decided as long ago as 1730 in *The Dutch West India Co. v. Van Moses* (b) and *Henriques v. Dutch West India Co.* (c), the latter of which was an appeal against a judgment on a *scire facias* brought by the plaintiffs in the first action against the bail of the defendant in that case. It was contended in argument for the appellants, that no recognizance in England could be given to this *Generalis privilegiata societas Belgica ad Indos Occidentales negotians*, inasmuch as the law of England did not take notice of any foreign

(a) *General Steam Navigation Co. v. Guillon*, 11 M. & W. 877; *Ingate v. Austrian Lloyd's*, 4 C. B. N. S. 704; 27 L. J. C. P. 323.

(b) 1 Str. 612.

(c) 2 Ld. Raym. 1532.

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corporation, nor could any foreign corporation in their corporate name and capacity maintain any action at common law in this kingdom. It was held, however, both by the King's Bench and the House of Lords that the objection was untenable. In a note added by Lord Raymond to the report, it is said that the original action by the Dutch company, which was for money lent, &c., was tried at Nisi Prius before Lord King in 1734, when it appeared that the cause of action accrued in Holland. Lord Raymond proceeds : "Upon the trial, Lord Chancellor King told me, he made the plaintiff give in evidence the proper instruments whereby by the law of Holland they were effectually created a corporation there. And after hearing the objections made by counsel, he directed the jury to find for the plaintiffs ; who accordingly did, and gave them £13,720 damages ; and afterwards a motion was made in the Common Pleas to set aside the verdict, but by the unanimous opinion of that Court the motion was denied "(a). This decision has been recognised and adopted in subsequent cases (b), and the principle that a foreign corporation may sue as plaintiff cannot therefore now be questioned. It must, however, be taken subject to the qualification already referred to, that the foreign corporation, so-called, must be something with the constitution and attributes of a body incorporated by English law. It was answered in argument to Lord Abinger, who said that the Court did not know what a corporation meant in France, that it was enough if the body referred to had in France the same incidents and immunities as a corporation in England (c). So Byles, J., says : "I doubted, and I still doubt, whether sect. 16 (of the Common Law Procedure Act, 1852) can apply to a foreign corporation trading abroad. We have no means

(a) 2 Ld. Raym. 1585.

(b) *South Carolina Bank v. Case*, 8 B. & C. 427; *National Bank of St. Charles v. De Bernales*, Ry. & M. N. P. C. 190; *Newby v. Colt's Patent Firearms Co.*, L. R. 7 Q. B. 293; *Scott v. Royal Wax Candle Co.*, L. R. 1 Q. B. D. 404; *Westman v. A. E. Snickarefabrik*, L. R. 1 Ex. D. 237.

(c) *General Steam Navigation Co. v. Guillon*, 11 M. & W. 877, 889.

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Corporations.

**Liability of
a foreign
corporation
to be sued.**

of knowing the constitution and attributes of such a body. It may be altogether different from our incorporated companies" (a). In the case last cited, the statute referred to was held not to have been intended to apply to foreign corporations; but the decision must be regarded as open to suspicion, having been questioned by Quain, J., in the later case of *Scott v. Royal Wax Candle Co.* (b).

The principle that foreign corporations might be recognised when suing as plaintiffs, was not extended to their appearance as defendants until a considerably later date. It was pointed out by Williams, J., in *Ingate v. Austrian Lloyd's* (c), that there was then (1858) no precedent for admitting foreign corporations to defend an action at law in their corporate capacity; but they had certainly been treated as defendants in the Courts of Chancery, and in *Carron Iron Co. v. Maclaren* (d) an injunction was granted by the Master of the Rolls against a Scotch, i.e., a foreign corporation. In the latter case, though objection was taken to the sufficiency of the service, and the presence of the company within the jurisdiction was denied, it was not contended that an English Court was incompetent to treat a foreign corporation as defendants, if proper service of the writ was effected upon them. It was not, however, directly held that it was competent to do so until *Newby v. Van Oppen* (e). "It is true that we are not aware," said Blackburn, J., "of any reported case in which a foreign corporation has been sued in a court of law; but it seems to follow, from their being permitted to sue as plaintiffs, that they must be suable as defendants. It is, however, enough to say that we will not on this ground prevent the plaintiff from proceeding. The corporation may, if so advised, raise the question after

(a) *Ingate v. Austrian Lloyd's*, 4 C. B. N.S. 704.

(b) L. R. 1 Q. B. D. 404, at p. 409: and see per Bramwell, B., *Westman v. A. E. Snickarefabrik*, L. R. 1 Ex. D. 237, 240.

(c) 4 C. B. N.S. 704, 709.

(d) 5 H. L. C. 416 (1855); so service ordered by Court of Chancery on an Irish corporation in *Lewis v. Baldwin*, 11 Beav. 153; see *Maclaren v. Stainton*, 16 Beav. 285.

(e) L. R. 7 Q. B. 293.

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appearing on the record." It should be remarked that, in this case, the defendant corporation was *de facto* carrying on business in England, though it does not appear that this fact was relied upon in the judgment on the question whether the action was maintainable. So it has been held, since the passing of the Judicature Acts, that the provisions in the schedule to these Acts for service of writs of summons or notice thereof out of the jurisdiction apply to actions against a foreign corporation resident out of the jurisdiction (a). "The language of Order xi., r. 1," said Cockburn, C.J., "appears to me large enough to include foreign corporations, and to be as applicable to them as to foreign subjects." "There is nothing of the language of the order," said Quain, J., "to sanction our making any difference between a foreign subject and a foreign corporation—between a natural person and an artificial person—in respect of service, and there is no reason in the nature of things why we should. With regard to the decision in *Ingate v. Austrian Lloyd's* (b), that s. 19 of the Common Law Procedure Act, 1852, did not apply to a foreign corporation, I should like to have that decision reconsidered if it were necessary." It has been decided, however, that notice of the writ of summons must be served, service of the writ itself having been set aside by the Exchequer Division of the High Court (c). "I am of opinion," said Bramwell, B., in the case last cited, "that we ought not to set aside the order permitting the issue of the writ, because a foreign corporation is suable in this country, and so a writ may lie against it." It can hardly be said without arguing in a circle, so far as this particular judgment is concerned, that it must be inferred that a foreign corporation is suable here, because the legislature has made provisions for serving notice of writs which have been construed as applicable to them; but that reasoning is quite consistent

(a) *Scott v. Royal Wax Candle Co.*, L. R. 1 Q. B. D. 404.

(b) 4 C. B. N.S. 704; 27 L. J. C. P. 323.

(c) *Westman v. A. E. Snickarefabrik*, L. R. 1 Ex. D. 287.

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Service of
writ of notice
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corporation.

with the decision of the Queen's Bench Division in *Scott v. Royal Wax Candle Co.* (*a*), and with the admitted right of the Court of Chancery to order service on a foreign corporation out of the jurisdiction, prior to the passing of the Judicature Acts.

It has been said that Blackburn, J., in *Newby v. Van Oppen* (*b*), affirmed the abstract proposition that a foreign corporation is suable in England. In that case the foreign corporation had a branch office and carried on business in England, and it was further held that service in such a case must be on a clerk or officer in the nature of a head officer, whose knowledge would be the knowledge of the corporation (*c*), in accordance with the English common law rule, re-enacted by statute, as to the proper service of a writ upon a corporation aggregate. It was with reference to this point alone that the subsequent case of *Mackereth v. Glasgow and South-Western Railway Co.* (*d*) was decided, and the question of the liability of a foreign corporation to be sued at all does not therefore seem to be affected by it. The defendants in that case were a Scotch corporation, with running powers over an English railway to Carlisle, and their only officer in England, upon whom the writ was served, was a booking-clerk at Carlisle, whose sole duty it was to issue tickets to travellers. It was held, that the booking-clerk was not a head officer or clerk of the defendants, upon whom service of the writ could properly be made, and that the defendants did not in any sense reside or carry on business (*e*) at Carlisle, so as to come within sect. 16 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76). According to the decisions under the Judicature Acts which have been already cited (*f*), the proper course under similar circumstances would be to

(*a*) L. R. 1 Q. B. D. 240.

(*b*) L. R. 7 Q. B. 293.

(*c*) See Tidd's Practice, ed. 1828, p. 121; 2 Will. 4, c. 39, s. 13; 15 & 16 Vict. c. 76, s. 16.

(*d*) L. R. 8 Ex. 149.

(*e*) As to the meaning of the words "carry on business," see *Shiels v. Great Northern Ry. Co.*, 30 L. J. Q. B. 331; *Garton v. Great Western Ry. Co.* 1 E. & E. 258; 28 L. J. Q. B. 103.

(*f*) *Westman v. A. E. Snickarefabrik*, L. R. 1 Ex. D. 237; *Scott v. Royal Wax Candle Co.*, L. R. 1 Q. B. D. 240.

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obtain leave, under Order II., r. 4, Order XI., r. 1, of the schedule to the Judicature Acts, to issue a writ against the defendants, and to serve them with notice of such writ out of the jurisdiction, i.e., on their head officer at their Scotch head office. The general principle that a foreign corporation is suable in England, subject to the ordinary rules of English procedure as to effecting service, is in no way impaired by the judgment in *Mackereth v. Glasgow and South-Western Railway Co.*; nor is there in reality anything hostile to it in *Carron Iron Co. v. Maclaren* (a), which was relied on in argument. All that was decided in the latter case on this point was that an alleged agent of the company in England was not an agent for the purpose of being served with notice of an injunction; and that unless the defendants were either resident in England or were sued in respect of acts or property in England, an injunction of the English Court of Chancery ought not to be enforced. No difference was in fact made between the position of a Scotch corporation and a Scotch domiciled subject; and the distinction between a natural person and an artificial person created by a foreign law, was not referred to.

The cases which have been decided upon the applicability of certain English statutes to foreign corporations, created by a subordinate jurisdiction, are not strictly matters of private international law, inasmuch as they necessarily depended upon the presumed intention of the English legislature; but it may be mentioned that the compulsory provisions for winding up companies under the Companies Act, 1862, have been held to include an Indian corporation, having a branch office and agent in England (b). It was apparently assumed, in another case, that such a company could have been wound up under the 11 & 12 Vict. c. 45, but the order was not made on the ground of its inexpediency (c). It does not appear,

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foreign
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jurisdiction.

(a) 5 H. L. C. 416, 458.

(b) *In re Commercial Bank of India*, L. R. 6 Eq. 517.

(c) *In re Union Bank of Calcutta*, 3 De G. & S. 253.

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however, that these statutes can in any case be regarded as applicable, or as intended by the legislature to be applicable, to foreign corporations or companies not established by a jurisdiction under the paramount authority of the British Crown. "Their Lordships are clearly of opinion," said James, L.J., in another case (*a*), "that the Companies Act, 1862, never contemplated that a foreign partnership, actually complete and existing in a foreign country, could be brought within the purview of the English Act of Parliament, the English legislature having no power over the shareholders of such a company." It was accordingly held, that the Consular Court in Egypt could not issue a sequestration against such of the members of a railway company and partnership in Egypt as were resident within its jurisdiction, for not complying with an order of that Court to register the company as one of limited liability under the Companies Act, 1862. The order, however, was obviously ineffectual for other reasons, being merely addressed to the only two members of the committee of the railway company who resided within the jurisdiction of the Court, and who had no other claim to represent the partnership.

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It has already appeared that corporations are regarded as persons capable of "residence" beyond the territorial limits of the State by whose legislature they were created, and it therefore becomes of interest to consider how far they are considered as possessed of domicil, and by what rules that domicil is governed. A corporation being in fact a mere intangible creature of the law, its domicil must be, as Westlake puts it (*b*), a notional conception only, introduced for purposes of jurisdiction and law. It is commonly supposed that a company resides where it has its central office for the transaction of its business; and certainly when it is also registered under and created by the laws of that jurisdiction, it must be regarded as having its domicil there, if anywhere. The question then arises,

(*a*) *Bulkeley v. Schultz*, L. R. 3 P. C. 764, 769.

(*b*) Westlake, P. I. L. § 55.

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whether a corporation can in any case have two domicils?—as, for example, when it has its head office for the transaction of business in one State, and is registered under the statutes of another; or when it has important offices, and carries on distinct business within each jurisdiction. In *The Carron Iron Co. v. Maclaren* (a) an injunction had been obtained against a Scotch corporation, restraining it from taking certain proceedings in Scotland, and notice of the injunction was served both on the company's agent in London, and on the manager in Scotland. The company did not appear, and the injunction was afterwards dissolved on their motion. Lord Cranworth laid down that there was no rule or principle of the Court of Chancery which, after a decree for administering a testator's assets (which was the case under discussion), would induce it to interfere with a foreign creditor resident abroad, suing for his debt in the courts of his own country, and that over such a creditor the Courts here could exercise no jurisdiction whatever. This was in effect an enunciation of the principle that a person domiciled abroad is not justiciable to the order of an English Court, except in respect of acts done or to be done in England, or in respect of property locally situate in England (b). It was then further laid down that on the facts the Carron Iron Company, so far as they could be said to have any locality at all, must be considered as a body "locally situate" in Scotland; and that the fact that they had property in England, and a resident agent for the sale of their goods, though it might enable the Court to make its injunction effectual, could not justify its issue. The company was therefore regarded as having its domicil in Scotland, but it was not directly laid down that it might not have been also regarded as domiciled in England, if the facts had warranted such a view. It was said indeed, by Lord St. Leonards, who dissented from Lord Brougham and Lord Cranworth in the House of Lords, that it might. "This company, I think, may

(a) 5 H. L. C. 416; S.C. *sub nom. Maclaren v. Stainton*, 16 Beav. 279.

(b) Story, § 589, 540; Westlake, P. I. L. § 127.

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properly be deemed both Scotch and English. It may, for the purposes of jurisdiction, be deemed to have two domicils. Its business is necessarily carried on by agents, and I do not know why its domicil should be considered to be confined to the place where the goods are manufactured. The business transacted in England is very extensive. The places of business may, for the purposes of jurisdiction, be properly deemed the domicil" (a). It is to be observed that the *dicta* of Lord St. Leonards do not go the length of saying that a corporation may have two domicils for any purposes except those of jurisdiction, and the peculiar nature of the jurisdiction claimed should also be remembered. It will be seen in its proper place (b) that mere transient residence within the jurisdiction, coming far short of domicil, will be held to justify an English Court in acting *in personam*, when there is any equity affecting the person in relation to an act done or to be done, or to property locally situate, in England.

Residence of
corporations.

It is seldom, in fact, that the *domicil* of a corporation, strictly speaking, can come in question. The cases in which the test of domicil is usually applied are those which arise on questions of marriage, divorce, legitimacy, and succession; matters in which no legislation can give the so-called person of a corporation the power of partaking. What is most commonly disputed is the applicability or non-applicability of certain statutes which use the words "residence" or "carrying on business," to the facts proved with regard to a foreign corporation; and between these cases and those which turn on domicil proper there is a narrow but well-defined line to be drawn. Residence itself is, of course, a phrase not strictly applicable to a corporation. Its use, in the words of Huddleston, B. (c), is founded upon the habits of a natural man, and is therefore inapplicable to the artificial and legal person to which the name corporation is given by the law. Nevertheless, as residence has been appointed for some purposes as the

(a) 5 H. L. C. 416, 449. (b) *Infrà*, Chaps. VI. (i), VII. (i), VIII. (i).

(c) *Cesena Sulphur Co. v. Nicholson*, L. R. 1 Ex. D. 428, 452.

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test of a trader's liability to the jurisdiction of the Crown, and as a corporation can undoubtedly trade, it has become necessary to determine how far a corporation can reside. By schedule D. to the 2nd section of 16 & 17 Vict. c. 34, duties are granted to the Crown (*inter alia*) "in respect of the annual profits or gains arising or accruing to any person residing within the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be carried on in the United Kingdom or elsewhere." By sect. 5 of the same statute, and by 5 & 6 Vict. c. 35, s. 40, the word "person," as used here, includes "corporation" or "joint-stock company." The residence of a corporation within the United Kingdom is therefore made a conclusive test of its liability to pay income tax in respect of the whole of its yearly gains, wherever made.

The cases that have been decided on the question of the "residence" of a corporation within the United Kingdom, for these purposes, by no means support the *dicta* of Lord St. Leonards in *The Carron Iron Company v. Maclaren* (a), just referred to, as to the possibility of a company having a double residence or domicil. In *The Att.-General v. Alexander*, the question was as to the liability under the section of the Income Tax Acts, cited above, of the Imperial Ottoman Bank. It was proved that the bank was a corporation created by Turkish law, and had its seat fixed, by the concession and the statutes which constituted it, at Constantinople, with power to establish branches and agencies at other places. It was the State bank of Turkey, where it was a bank of issue, and was charged with the collection of the revenue, and with certain operations relating to the currency, and with the payment of interest on the public debt, and received from the State a subsidy on account of the business transacted by it. On its creation it took over and continued to carry on the business of an English bank in London ; and since its creation, the annual meetings of shareholders had always been held, and dividends declared, in London ; though the

(a) 5 H. L. 416, 449.

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statutes permitted the annual meetings to be held at any place which the committee of management might fix. It was held, that the bank must be regarded as residing at Constantinople alone, where it had its seat, and not in London, and that it was consequently only liable to pay income tax on the profits made by it in England. "We have to deal with this question," said Cleasby, B., "merely upon the words 'any person residing in the United Kingdom.' Now, if residence could not be predicated of a corporation, if the idea were not applicable to a corporation under this Act of Parliament, then, of course, the first branch of the schedule could not apply. The argument is not put on that ground; and we have to consider whether it is made out, not only that the word 'person' is fulfilled by this body, which is a corporation, but whether the terms 'residing within the United Kingdom' are also satisfied. . . . It appears to me sufficient to say that, looking at the constitution of the Imperial Ottoman Bank, we can see it did not carry on business in England in such a sense that we should be justified in saying it resided here. . . . It is not made out that the bank is resident in England, or is even carrying on its business here, though *some* of its business is carried on here" (a). "It was contended at first," said Amphlett, B., in the same case, "that a person carrying on business in London or elsewhere might be said to reside where he was carrying on business; so that, if he had two or three establishments in different countries, he might be said to reside in any of those countries. . . . But this was abandoned as untenable (b); and if that is so, if an individual cannot be said to reside wherever he carries on his business, how can a foreign corporation be said to reside within the kingdom for no other reason than that it carries on business there? It must follow the same rule. What, then, is the reasonable meaning of a corporation residing anywhere? It appears to me that it is this, that a

(a) L. R. 10 Ex. 32.

(b) *Sulley v. Attorney-General*, 5 H. & N. 711; 29 L. J. Ex. 464.

corporation may be said to reside wherever it has its seat" (a).

The principle of these judgments is confirmed by the later decision in the analogous case of *The Cesena Sulphur Company v. Nicholson* (b), which depended upon the same statute. Both in that case and in the instance of *The Calcutta Jute Mills Company*, which was argued at the same time, the corporation in question was incorporated under the English statutes (the Companies Acts, 1862 and 1867) with a board of directors who met in England, where the head office was situated. In both cases the profits were exclusively earned abroad, where the whole of the practical business was carried on; and in both cases it was decided that the company was resident in England, and must pay income tax upon the whole amount of its profits, wherever earned (c). The decision of Kelly, C.B., was based upon the ground that whether there might or might not be more than one place at which the same corporation or joint-stock company resided, a joint-stock company did at any rate reside where its place of incorporation was, where the meetings of the whole company, or those who represented it, were held, and where its governing body met in bodily presence for the purposes of the company, and exercised the powers conferred upon it by statute and by the articles of association. "The use of the word 'residence,'" said Huddleston, B., "is founded upon the habits of a natural man, and is therefore inapplicable to the artificial and legal person whom we call a corporation. But for the purpose of giving effect to the words of the legislature an artificial residence must be assigned to this artificial person, and one formed on the analogy of natural persons. . . : I do not think that the principle of law is really disputed, that the artificial residence which must be assigned to the artificial person is

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(a) L. R. 10 Ex. 20, 33.

(b) L. R. 1 Ex. D. 428.

(c) Income tax is further payable upon the whole amount of the annual profits, whether such profits are or are not remitted to this country for distribution among shareholders: *Imperial Continental Gas Association v. Nicholson*, 37 L. T. 717.

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the place where the real business is carried on." It will be seen that though Kelly, C.B., guarded himself from being supposed to lay down that a corporation could have but one residence, the language just cited is not limited by a similar restriction, and points strongly to that proposition. The language of Amphlett, B., in *The Attorney-General v. Alexander* is, as has been already pointed out, even more decided. It is obvious that if the artificial residence which is attributed to an artificial person is to be analogous to the natural residence attributed to a natural person, the analogy must be carried out consistently. The birth-place of a natural individual is not conclusive evidence of his domicil or his residence. It is *prima facie* evidence of his domicil of origin, and his domicil of origin is *prima facie* his actual domicil and residence *de facto*. He may be a man who once resided in one country, and now resides in another, but he can only be residing in one country at the time the inquiry is made (b). So in the case of an artificial person, incorporation and registration are or should be merely facts to be taken into consideration in determining the locality of the artificial residence which is to be attributed to the corporation. *Prima facie* they shew where it resides; but if it is established that the seat of its business is elsewhere, that it has in fact left its birth-place, those circumstances are no more conclusive than is the circumstance of birth in the case of the natural individual (c). Further, just as a natural person must be pronounced, for the purposes of domicil, to be resident in some one place more than in any other, however nicely balanced the evidence may be, so a corporation should be regarded as necessarily having its seat or centre of operations (*der Mittelpunkt des Geschäfts, le centre de l'entreprise*) in some one spot to the exclusion of all others. It may be difficult to decide

(a) *Cesena Sulphur Co. v. Nicholson*, L. R. 1 Ex. D. 428, 452, 454.

(b) Story, § 45 (a.); Westlake, § 316; *Somerville v. Somerville*, 5 Ves. 786. This does not apply to mercantile domicil in time of war: *The Jonge Klasina*, 5 C. Rob. 297.

(c) *Cesena Sulphur Co. v. Nicholson*, L. R. 1 Ex. D. 428, 453.

between two or more places whose claims appear conflicting, but it appears to be the duty of the law to pronounce between them, and to declare that in fact as well as in law one establishment is the centre where the corporation resides, while the other establishments are merely branch offices or agencies.

The seat of a corporation being therefore the place where the business is carried on, the English decisions on those statutes which make it necessary, for the purposes of county court jurisdiction, to determine where the place of business of the plaintiff or defendant is carried on (*a*), will afford some assistance in answering the question in individual cases. Thus it has been held that the place of business of a lime, cement, brick, and manure company was at their works in Somersetshire, where the lime, &c., was made, sold, and delivered, and not in London, where the registered office was situate and the meetings of the directors had been held (*b*) ; that a registered company does not "carry on its business" where an agent sells their goods in his own name (*c*) ; that the Great Western Railway Company carried on its business at Paddington, the London and North-Western Railway Company at Euston Square, and the Great Northern Railway Company at King's Cross, and not at the minor stations on the line (*d*) ; and that the seat of the business of a promenade pier company was in London, where the registered office was situate and the general business transacted, although the pier, the erection and maintenance of which were the sole objects of the company's existence, and from which the whole revenue of the company was derived, was situate at Aberystwith in Wales (*e*). And a railway company incorporated under a private Act of the British Parliament

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(*a*) *Taylor v. Crowland Gas and Coke Co.*, 11 Ex. 1; 24 L. J. Ex. 233.
(*b*) *Keynsham Blue Lias Lime Co. v. Baker*, 33 L. J. Ex. 41. But see *Cesena Sulphur Co. v. Nicholson*, L. R. 1 Ex. D. 428, cited above, with which this case appears scarcely consistent.

(*c*) *Oldham Building, &c., Co. v. Heald*, 33 L. J. Ex. 236.
(*d*) *Adams v. Great Western Ry. Co.*, 30 L. J. Ex. 124; 6 H. & N. 404; *Brown v. London and North-Western Ry. Co.*, 32 L. J. Q. B. 318; 4 B. & S. 326; *Shiels v. Great Northern Ry. Co.*, 30 L. J. Q. B. 331.

(*e*) *Aberystwith Promenade Pier Co. v. Cooper*, 35 L. J. Q. B. 44.

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for the purpose of making a railway in Ireland, with an office in Westminster for the transaction of business, and no property or effects in Ireland, was held to be a foreign corporation so as to be bound to give security for costs when suing in England (*a*). Whether these decisions are all strictly in concord is not so important as the general conclusion to which they point, that the question where a corporation resides, dwells, has its seat, or carries on its business, is one and the same question of fact, depending for its answer, as does the question of domicil in the case of an individual, upon a review of all the circumstances of the particular case. Notwithstanding certain ambiguous expressions in the case of *The Carron Iron Company v. Maclaren* (*b*), which have been already referred to, it seems probable that this sort of residence is the nearest approach to the domicil of an individual, of which the artificial person called a corporation is capable.

Foreign corporations, when once they have become litigants in an English Court, occupy the same position as natural individual persons; and their peculiar nature is not allowed to deprive their opponent of any of the ordinary rights incidental to litigation. Order xxxi., rule 4 of the schedule to the Judicature Acts provides that if any party to an action be a body corporate or any other body of persons, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply at chambers for an order allowing him to deliver interrogatories to any member or officer of such corporation or body of persons, and an order may be made accordingly. Whether a foreign corporation, incorporated by foreign and not by English law, was included under the general term *corporation* might perhaps have been disputed; but it has been sufficiently shewn that it is at any rate a "body of persons empowered by law to sue or be sued," and it therefore

(*a*) *Kilkenny, &c., Ry. Co. v. Feilden*, 6 Ex. 81; 20 L. J. Ex. 141; *Edinburgh and Leith Ry. Co. v. Dawson*, 7 Dowl. 573.

(*b*) 5 H. L. C. 416.

clearly comes within the latter part of the rule. The same rule has been applied to the case of a foreign republic, in a case (*a*) from which it appears that where the foreign corporation or State is plaintiff, all proceedings may be stayed until a proper person is named on their behalf to give discovery.

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(ii.) *Foreign States and Sovereigns.*

With regard to any particular municipal law, a foreign State must be regarded as occupying a position closely analogous to that of a foreign corporation ; the personality of the latter being conferred upon it by its own municipal law, while that of the former is created by the public law of nations. "Every government," says Lord Cranworth, "in its dealings with others necessarily partakes in many respects of the character of a corporation. It must, of necessity, be treated as a body having perpetual succession. It would not be represented by all or any of the individuals of whom it is from time to time composed. With respect to the provisional government, during the time of the transactions in question, material changes took place as to the persons who from time to time exercised its functions. It is impossible to say that the defendants ever were agents of all or any of the individuals who from time to time composed that government. Those who, as constituting the government, stood, if they did stand, in the relation of *cestuis que trust* or of principals towards the defendants, ceased to fill that character when they ceased to be members of the government ; so that, the executive government being now at an end, either the defendants have ceased to fill the character of trustees or agents at all, or they have become trustees or agents for the plaintiff, as the person now in possession of the supreme authority. The case may be likened to that of a person who had property in his hands entrusted to him by a

(*a*) *Republic of Costa Rica v. Erlanger*, L. R. 1 Ch. D. 171.

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corporation" (a). The passage just cited shews that the analogy between a corporation and a State may be pushed even further. When the Government in possession of the supreme authority assumes a democratic or republican form, the State occupies the position, with regard to foreign municipal law, of a corporation aggregate. When the constitution of the State is monarchical, the Sovereign is regarded as a corporation *sole*. Until comparatively modern days, the maxim of the French despot, "*L'Etat, c'est moi,*" was so far true that the Sovereign was universally regarded as the essential representative of the State over which he ruled; and it was well settled that a foreign Sovereign could sue in an English Court long before the personality of a republic or confederation of States came in question (b). Nor is the admitted right of a foreign Sovereign to sue confined either to his own private and personal injuries, or even to the rights of property which are vested in him by the law of his State. He is the representative of his nation, and may sue in respect of all public political rights which belong to him as such, whether they are, for internal purposes, vested in him, or in some legislative or representative body of the State (c). It is of course obvious that a foreign Sovereign cannot sue in respect of an international wrong; i.e., an injury done by one State to another. The only redress for such an injury as that lies in diplomacy or war; but whenever either the private property of the Sovereign, or the public property of the State of which he is the impersonation, is injured by a private individual belonging to another State, the tribunals of that State are available to repair the wrong (d). It appears, however, to have been laid down as a rule by the House of Lords in the case of

(a) *King of Two Sicilies v. Wilcox*, 20 L. J. Ch. 417, 420; 1 Sim. N. S. 301.

(b) *Rolle Ab. tit. "Admiralty"* E. 3; *King of Spain v. Hullett*, 1 Dow & Cl. 169; *Nabob of Arcot v. East India Co.*, 3 B. C. C. 180; *Emperor of Brazil v. Robinson*, 1 Dowl. P. C. 522.

(c) *Emperor of Austria v. Day*, 2 Giff. 628.

(d) *King of Two Sicilies v. Wilcox*, 1 Sim. N. S. 301; *Hullett v. King of Spain*, 1 Dow & Cl. 169; *Emperor of Austria v. Day*, 2 Giff. 628.

the King of Spain, and adopted by the Court of Chancery in *The Emperor of Austria v. Day*, that the dignity of such a plaintiff is not to be disparaged by giving him costs.

It has been already stated that the interpretation clause in the schedule to the Judicature Acts includes in the word "person," in the construction of the Rules of Court, corporations and bodies politic (Order LXIII., sched. to Judicature Acts, 1873 and 1875); language which in itself points to a distinction between ordinary foreign corporations and those greater international personalities which are commonly called States, and is probably borrowed from language used by Lord Hatherley in a well-known modern case (a), in which the principle that such bodies politic have a right to sue was eventually laid down by the Court of Appeal (b).

It will be seen that the only difficulty in recognising the right of a foreign State to sue in an English Court, as distinguished from the Sovereign of such a State, arose from the simple fact that a State had not, on the ordinary principles of law, any individuality which entitled it to the rights of a natural person—in other words, it was neither a natural person nor an artificial person, such as a corporation. In other respects, the arguments in favour of the right of a Sovereign to sue in his representative character applied with equal force to the right of a nation living under a democratic form of government. "I have no doubt," says Lord Redesdale, "but a foreign Sovereign may sue in this country; otherwise there would be a right without a remedy. He sues here on behalf of his subjects; and if foreign Sovereigns were not allowed to do that, the refusal might be a cause of war" (c). A plausible objection was, however, raised to the right of a State to sue in its own impersonal name, on the ground that such a plaintiff would be able to sue without naming any person

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(a) *United States of America v. Wagner*, L. R. 3 Eq. 724, 731.

(b) S. C. 2 Ch. 582.

(c) *Hullett v. King of Spain*, 1 Dow & Cl. 174.

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to act on their behalf, or to comply with the ordinary requisitions of justice in the progress of the suit, thus obtaining an advantage which no other suitor could secure (a). This difficulty has, however, been overcome in the case of an ordinary foreign corporation for trading purposes, by making the secretary or other officer a party for the purpose of discovery, the Court assuming that such officer is under the control of the corporation (b); but it was at first regarded as an insuperable bar to an action by a corporate State not represented by a Sovereign. Thus, in *The Columbian Government v. Rothschild*, a demurrer was allowed to a bill brought by the Columbian Government in that name. "A foreign State," said Sir J. Leach, "is as well entitled as any individual to the aid of this Court in the assertion of its rights, but it must sue in a form which makes it possible for this Court to do justice to the defendants. It must sue in the names of some public officers who are entitled to represent the interests of the State, and upon whom process can be served on the part of the defendants, and who can be called upon to answer the cross bill of the defendants. This general description of the 'Columbian Government' precludes the defendants from these just rights; and no instance can be stated in which this Court has entertained the suit of a foreign State by such a description" (c). This decision was recognised by the House of Lords in *King of Spain v. Hullett* and *Hullett v. King of Spain* (d), and followed by V.-C. Page Wood (Lord Hatherley) in 1867; but his judgment was expressly reversed by the Court of Appeal, and *The Columbian Government v. Rothschild* distinguished. "The *dictum*," said Lord Chelmsford, "that a foreign State must sue in the name of some public officers who are entitled to represent the interests of the State, must have referred to some persons or body in whom the interests of the State

(a) *United States of America v. Wagner*, L. R. 3 Eq. 724, 781; *Columbian Government v. Rothschild*, 1 Sim. 94.

(b) *Collins Co. v. Brown*, 3 K. & J. 422; *Wych v. Meal*, 3 P. Wms. 311.

(c) 1 Sim. 94, 103.

(d) 7 Bl. N. S. 359; 2 Bl. N. S. 31.

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were vested, and who were, therefore, entitled to represent it in a suit. There was nothing upon the face of the bill to indicate whether the Government of Columbia was such a body, or, indeed, of whom it was composed; so that, if the defendants had been desirous of filing a cross bill, they would have been wholly unable, from information contained in the original bill, to know upon whom process should be served I do not see what injustice can be done by permitting the United States of America to proceed in this case in their own name. . . . If the defendant wishes to obtain a discovery, and files a cross bill for that purpose, he may apply to the United States to name some person from whom the discovery sought for may be obtained, and if they refuse to furnish him with this information, the Court will be justified in staying the proceedings in the suit until the defendants' demand is complied with" (a). And Lord Cairns said, in the same case, that nothing could be more unreasonable to suppose that Sir J. Leach meant in *Columbian Government v. Rothschild* to decide, and to decide for the first time, that a republic could not sue in its own name, but must have, or must create, some officer to maintain a suit on its behalf.

The principle, then, that a State not represented by a Sovereign may nevertheless sue in its own name in English courts, as a personality created by the law of nations, must be taken as settled, and has been followed in several subsequent cases (b). This intangible personality does, in fact, occupy exactly the same position in a republic that the Sovereign holds in a monarchy. The Sovereign, in a monarchical form of government, may, as between himself and his subjects, be a trustee for the latter, more

(a) *United States of America v. Wagner*, L. R. 2 Ch. 582, 589. This procedure was actually followed in *Republic of Peru v. Weguelin*, L. R. 20 Eq. 140. The person named should have been made defendant in a cross suit under the old practice; see now Judicature Acts, Ord. XXI., r. 4.

(b) *Republic of Liberia v. Imperial Bank*, L. R. 16 Eq. 179; 9 Ch. 589; *Republic of Costa Rica v. Erlanger*, L. R. 19 Eq. 38; *Republic of Peru v. Weguelin*, L. R. 7 C. P. 352; 20 Eq. 140.

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or less limited in his powers over the property which he seeks by action to recover. But in the courts of a foreign State, as in diplomatic intercourse with the Government of a foreign State, it is the Sovereign, and not the State, or the subjects of the Sovereign, that is recognised. From him, and as representing him individually, and not his state or kingdom, is an ambassador received. In him individually, and not in a representative capacity, is the public property assumed by all other States, and by the Courts of all other States, to be vested. In a republic, on the other hand, the sovereign power, and with it the public property, is held to remain and to reside in the State itself, and not in any officer of the State. It is from the State that an ambassador is accredited, and it is with the State that the diplomatic intercourse is conducted (*a*). The right to the public property of the State must draw with it the right to sue for that property, and to enforce the choses in action which are a part of it. Hence the only difficulty in the way of recognising the right of a State to sue in its own name could never have been more than a technical one, the proper method of overcoming which has already been indicated (*b*).

Liability of
foreign State
or Sovereign
to be sued,
where no
waiver of
sovereignty.

The liability of a foreign State or Sovereign to be sued in the tribunals of another country rests of course upon very different principles. A Sovereign or a sovereign State who submits to the jurisdiction of a foreign tribunal for the purpose of obtaining relief does, of course, by asking its assistance, impliedly waive any sanctity or protection which the law of nations gives him or it, and stands, with reference to the procedure and practice of the Court, in the position of an ordinary litigant (*c*). There is not, however, any authority for holding that a foreign Sovereign who has not so submitted himself to the jurisdiction of a Court of another country may be sued or made amenable

(*a*) *Per Lord Cairns*, in *United States of America v. Wagner*, L. R. 2 Ch. 582, 593.

(*b*) *Republic of Peru v. Weguelin*, L. R. 20 Eq. 140.

(*c*) *Hullett v. King of Spain*, 4 Russ. 225, 560; 1 Dow & Cl. 169; 1 Cl. & F. 333; 7 Bl. N. S. 359; *Duke of Brunswick v. King of Hanover*.

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in it; and if such an action was nominally maintainable, the judgment of the Court in it could not, of course, be executed without a breach of public international law, and the danger of incurring war. In *Calvin's Case* (a) it is indeed said that if a King of a foreign nation come into England, by the leave of the King of this realm (as it ought to be), he shall sue *and be sued* by the name of a King; but the object of the *dictum* is to shew, not that a foreign Sovereign may be sued, but that a foreign Sovereign carries his dignity with him into England, and is a King there as much as in his own realm. Nor is there any instance cited to support the principle except a *dictum* from a case decided in 11 Ed. III. (b), that if a man bring a writ against Edward Baliol, and name him not King of Scotland, the writ should abate. Edward Baliol was, of course, a feudatory of the Crown of England, and not a foreign Sovereign at all in the modern meaning of the term. The case referred to by Selden (c), where the King of Spain was outlawed for not appearing in a suit, or paying the costs which had been adjudged against him, shews, in effect, that a foreign Sovereign cannot practically be sued unless he submits to the jurisdiction. The King of Spain not having appeared, there could of course be no demurrer; and it would in fact have been impossible to have obtained the fruits of the judgment which seems to have been given against him by default, had it not been for the fact that he had submitted to the jurisdiction so far as to bring other suits, which were then pending, against English merchants. By the process of outlawry, he could of course be prevented from prosecuting these, and this questionable course had therefore the effect of inducing him to pay the costs that were claimed, that he might be allowed to maintain the other actions he had brought in English Courts. In *Hullett v. King of Spain* (d)

(a) 7 Rep. (Coke), 15 b.

(b) Moor. 803; 9 Co. 117, b.

(c) Selden's Table Talk "Law," 3. See Lord Campbell's remarks on this case, impeaching its authority, in *De Haber v. Queen of Portugal*, 17 Q. B. 211.

(d) 1 Cl. & F. 354.

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a cross bill was no doubt held to be maintainable against a foreign Sovereign; but there the King of Spain had by his original bill submitted to the jurisdiction, and therefore rendered himself subject to the control of the Court and liable to the rules of practice. In *Duke of Brunswick v. King of Hanover* the subject was carefully considered by Lord Langdale, who laid down that although in many instances sovereign princes, for the sake of having a claim or right determined, might have been afforded an opportunity of appearing, and might have voluntarily appeared as defendants before the tribunals of this country, yet that it did not appear how a foreign prince could be effectually cited, nor what control an English Court could have over him or his rights; and further that no case had been cited before him in which it had been determined that a foreign Sovereign, not himself a plaintiff or claimant, and insisting upon his alleged right to be exempt from the jurisdiction, had been held bound to submit to it. "On the whole," said Lord Langdale, "it ought to be considered as a general rule, in accordance with the law of nations, that a sovereign prince, resident in the dominions of another, is exempt from the jurisdiction of the courts there" (a).

Liability of
person uniting
sovereign and
private
character.

It has, however, happened that the characters of Sovereign and subject have at the same time existed in the same person, in which case the test of liability has been whether the action was brought in respect of transactions entered into in the capacity of the Sovereign or of the subject. Thus in the case just cited, where the King of Hanover was also a British peer resident in England, it was held that, being a subject of the Crown, he was liable to be sued in the courts of this country in respect of any acts and transactions done by him, or in which he might have been engaged, as such subject, but not for any acts done by him as King of Hanover, or in his character of a sovereign prince (b). It was added, that where there was

(a) *Duke of Brunswick v. King of Hanover*, 6 Beav. 1, 51. See the older cases of *Barclay v. Russell*, 3 Ves. 431; *De la Torre v. Bernales*, cited 5 Beav. 21.

(b) *Ibid.* 6 Beav. 1, 57.

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a doubt as to the capacity or character in which any particular act was done, it ought to be presumed, *prima facie*, that it was done in the capacity of the Sovereign. Similarly in *Moodalay v. Morton* (a), Lord Kenyon says: "I admit that no suit will lie in this court against a sovereign power for anything done in that capacity, but I do not think the East India Company is within the rule. They have rights as a sovereign power; they have also duties as individuals; if they enter into bonds in India, the sums secured may be recovered here. So in this case, as a private company they have entered into a private contract, to which they must be liable." The case of *The Nabob of India v. The East India Company* (b), according to the note to the report, does not seem to have been decided exactly with reference to the general liability of the defendants to an action, but rather on the ground that the transaction, in respect of which they were sued, was a matter of political discussion; but this appears to be no more than evidence that the company had, in that transaction, acted in their political or sovereign capacity, and not in the character of a private trading company or corporation. The judgment, which is extremely short, is put on the ground that the circumstance of the defendants being subjects of the Crown was immaterial, inasmuch as the plaintiff had treated with the East India Company in the transaction as with an independent Sovereign. In other words, a person or personality, in whom the characters of Sovereign and subject are united, is liable to an action in English Courts for all acts or contracts entered into in his private capacity, but not in respect of transactions in which he has been engaged as the sovereign impersonation of a State.

Further, even when the alleged sovereign power does not also bear the character for certain purposes of the subject of another Sovereign, it would appear that the

(a) 1 B. C. C. 47 a.

(b) 4 B. C. C. 179; *ib.* note; and see *Secretary of State for India v. Kamachee Boye Sahaba*; 13 Moo. P. C. 22.

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privilege of independent sovereignty may be waived by the fact that trade has been carried on by the Sovereign in the apparent character of and subject to the same conditions as a private individual. In the case of *The Swift* (a), it was contended that the old Navigation Laws (15 Car. II. c. 7), which prohibited the conveyance of European produce from one colony in America to another, were binding upon the King, and Lord Stowell, in holding that there had not been in that particular case a breach of the law, expressed the following opinion : "The utmost that I can venture to admit is that, if the King traded, as some Sovereigns do, he might fall within the operation of these statutes. Some Sovereigns have a monopoly of certain commodities, in which they traffick on the common principle that other traders traffick ; and if the King of England so possessed and so exercised any monopoly, I am not prepared to say that he must not conform his traffick to the general rules by which all trade is regulated" (b). If the Sovereign of Great Britain is to become amenable to the procedure of his own tribunals by entering into trade as a private individual, it would, *à fortiori*, seem that the immunity of foreign Sovereigns could be waived in the same manner. The question arose incidentally in *The Charkieh* (c), which was a cause of damage instituted by the owners of a Dutch vessel against a steamship belonging to the Khedive of Egypt, and carrying the flag of the Ottoman Navy, but at the time of the collision under charter to British subjects and advertised to carry cargo to Alexandria. It was held that the action was maintainable, both on the ground that the Khedive of Egypt was not an independent Sovereign, and on the ground that, even if he was, the privilege of sovereignty did not exclude an action for damage against the vessel itself, being a proceeding *in rem* ; but it was also intimated by Sir R. Phillimore that, even assuming that the Khedive was entitled to the immunity of a Sovereign, he had, by enter-

(a) 1 Dods. 320 (1813).

(b) 1 Dods. 320, 339.

(c) L. R. 4 A. & E. 59.

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Sovereign of
immunity.

ing into trade as a private individual, waived or forfeited that privilege. "If ever there was a case in which the alleged Sovereign, to use the language of Bynkershoek (*a*), was *strenus mercatorem agens*, or in which, as Lord Stowell says, he ought to traffic on the common principles that other traders traffic, it is the present case; and if ever a privileged person can waive his privilege by his conduct, the privilege has been waived in this case" (*b*). And lastly, the ordinary immunity from action which attaches to a foreign Sovereign may be waived by the acquisition of immovable property within the jurisdiction (*c*); so far, that is, as actions relating to such immovable property are concerned. This is, no doubt, strictly upon the ground that no law, municipal or international, can be permitted to withdraw any part of the soil of a State from the control of its tribunals; and that foreigners, whether Sovereigns or subjects, are only allowed to acquire and hold British land subject to the condition of waiving any such privilege conferred by international law; but Sir R. Phillimore points out that it may also be supported on two grounds. These are, first, that the owner of such property has so incorporated himself into the jural system of the State in which he holds such property, that the argument of general inconvenience to States from allowing the exemption outweighs the argument from convenience on which the exemption in other matters is bottomed; and secondly, that such a suit can be carried on without the necessity of serving process upon the Sovereign, or of interfering in any way with such personal property as may be requisite for the due discharge of his functions (*d*).

If the foreign government does not appear and submit to the jurisdiction, there may, of course, be cases in which relief may be practically obtained against an agent employed by it, without the necessity of considering whether

(*a*) *Opera Omnia*, vol. ii. p. 165 (ed. 1767).

(*b*) L. R. 4 A. & E. 59, 99; *Phill. Int. Law*, ii. 181 (2nd ed.); *Wheaton, Int. Law (Dana)*, s. 101, p. 161.

(*c*) *Wheaton, Int. Law (Dana)* s. 103; *The Charkieh*, L. R. 4 A. & E. 97; *Taylor v. Best*, 14 C. B. 487, 523; 23 L. J. C. P. 89.

(*d*) L. R. 4 A. & E. 97; *per* Sir R. Phillimore.

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the action is on principles of international law maintainable against the government itself. Thus in *Larivière v. Morgan* (a), the French Government had contracted in England for the purchase of a large quantity of ammunition, which was to be paid for through the French ambassador when accepted; and the defendants, Morgan and others, who were English bankers, wrote to the contractor in England that a special credit for £40,000 had been opened in his favour, and would be paid to him on receipt of certificates from the French ambassador. Part of the ammunition having been delivered and paid for, further certificates and payments were refused, and the contractor thereupon filed his bill against the bankers and the French Government, praying to have the balance of the £40,000 brought into court, and for an inquiry and payment. The French Government did not appear; but the bankers were ordered to bring the money into Court, and the contractor was declared to be entitled to payment for all goods delivered under the contract. "I will put the case," said Lord Hatherley, "of a foreign government having placed in this country a sum of money, and having charged it with certain trusts to be performed, subject to which the balance is to be paid back to the foreign government. Is it possible to say that in such a case the trustee is not liable to perform the trust because the foreign government, one of the *cestuis que trust*, cannot be made to appear?" (b) So in *Gladstone v. Musurus Bey* (c), where the plaintiffs had deposited certain securities in the Bank of England in the name of the Turkish ambassador, to secure the performance by them of a contract they had entered into with the Turkish Government, on the Turkish Government, through their ambassador, threatening to withdraw the securities deposited without having fulfilled their part of the contract, it was held that though it was not competent to the plaintiffs to obtain an injunction

(a) L. R. 7 Ch. 550.

(b) L. R. 7 Ch. 560; *Stevenson v. Anderson*, 2 V. & B. 407.

(c) 1 H. & M. 495.

against the Turkish Government or ambassador, yet an injunction might be granted against the Bank to restrain them from parting with the securities or the funds representing them. In that event, if the Ottoman Government or its ambassador had attempted to compel the Bank to pay the proceeds to them, or to obtain damages against it for refusing to do so, they would of course have been compelled to avail themselves of the assistance of the English Courts, and therefore would have been regarded as submitting to the jurisdiction for all purposes. But Equities where the contract, which it is really attempted to take advantage of and enforce, was actually made with the foreign Sovereign, a bill was held not to lie against a third person with whom the same foreign Sovereign had entered into an agreement in derogation of the advantages promised by his former contract with the plaintiffs, the bill praying an injunction and a declaration of the plaintiffs' exclusive right (a); and it was said by Lord Hatherley, that those who depend upon the grant of a foreign Sovereign cannot obtain the aid of the Court against the act of the foreign Sovereign in making a second grant inconsistent with the first. It is to be observed that in this case the Ottoman Bank, who were the nominal defendants, were in no sense the trustees or agents of the Ottoman Government, and the substantial ground of the decision seems to have been, that the Court could not assert any jurisdiction to interfere with any acts of a foreign Sovereign done in the exercise of his sovereign power. The only equity alleged as affecting the defendants was that they had entered into their agreement with the Ottoman Government with full knowledge of the prior concession to the plaintiffs; but with neither of these contracts did the Court hold that it had any jurisdiction to deal, and it could not, therefore, deal with the equities arising out of them.

How far relief may be obtained against a foreign Sovereign by a proceeding *in rem* (excluding the case of

(a) *Gladstone v. Ottoman Bank*, 1 H. & M. 505.

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arising out of
contract by
foreign State.

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immovable property, which will be elsewhere considered), does not appear quite free from doubt. In *The Charkieh* (a), Sir R. Phillimore held that, even if the Khedive was entitled to the privileges of a sovereign prince, it would not oust the jurisdiction of the Court to entertain a cause of damage against a vessel belonging to him ; but that decision was apparently on the ground that the *Charkieh*, though the property of the Khedive, was yet employed by him for the ordinary purposes of trade, as if the property of a private individual. It was not held, and never has been, that a ship of war belonging to the navy of a foreign government is liable to any proceedings in an English Court (b). The opinion of Lord Stowell in *The Prins Frederik* (c) pointed to the opposite conclusion. In that case a Dutch ship of war had been saved from shipwreck by British subjects, who libelled her for salvage. On an objection to the jurisdiction being taken, it was contended that the salvors were not suing a foreign Sovereign *in personam*, but were proceeding *in rem* against a ship within the jurisdiction of the English Court. According to Lord Campbell (d), Lord Stowell was of opinion, in accordance with that which he had previously expressed in *The Comus* (e), that this distinction was untenable ; but a representation having been made to the Dutch Government on the subject, the matter was settled by arbitration. But it is quite clear that, if a foreign Sovereign does not choose to appear to an action brought against him here, movable property belonging to that Sovereign which happens to be locally situate in England cannot be attached to compel appearance (f). It was said in the cases cited, that if such an attachment be issued, the garnishee is the proper person to move for a prohibition, but that such a prohibition may be granted on the motion of the Sovereign who

(a) L. R. 4 A. & E. 59.

(b) Ib. 100, 96. (c) 2 Dods. 451, cited 17 Q. B. 212.

(d) *De Haber v. Queen of Portugal*, 17 Q. B. 212.

(e) Cited 2 Dods. 464.

(f) *Wadsworth v. Queen of Portugal*, 20 L. J. Q. B. 488 ; 17 Q. B. 171 ; *De Haber v. Queen of Portugal*, 20 L. J. Q. B. 495 ; 17 Q. B. 196.

has not appeared in the action, or even on that of a mere stranger. In the first case it was not expressly stated that the Queen of Spain was sued in her sovereign capacity, but it was held sufficient that that fact should appear from the disclosures in the affidavits; and it appears from the judgment in *Duke of Brunswick v. King of Hanover* (a) that the law in such a case will presume the foreign Sovereign to have acted in that character.

The rules which have been laid down above, as to the Sovereignty rights and liabilities of foreign Sovereigns and States in English Courts, are of course subject to the condition that the international independence and personality of the alleged Sovereign or State shall have been recognised by the Government of Great Britain in accordance with the law of nations; and English Courts are, it seems, bound to know or ascertain judicially whether such recognition has in fact been accorded (b). In *The Charkieh* this question arose with reference to the Khedive of Egypt, before Sir R. Phillimore, who stated in his judgment that he had endeavoured to inform himself, and had had recourse to obtain this knowledge to (1) the general history of the Government of Egypt, (2) the firmans which contain the public law of the Ottoman Empire on the subject, (3) the European treaties concerning the relations between Egypt and the Porte, and (4) the Foreign Office itself. On these materials Sir R. Phillimore held that the Khedive of Egypt was not an independent Sovereign, thus sanctioning by implication the view taken by counsel, that the sovereignty or quasi-sovereignty of a foreign government or prince was not to be established by evidence offered by the parties in the cause, but by the judicial knowledge of the Court (c). The oldest case in which this principle was laid down appears to be that of *City of Berne v. Bank*

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(a) 6 Beav. 1; *ante*, p. 95.

(b) *The Charkieh*, L. R. 4 A. & E. 66; *City of Berne v. Bank of England*, 9 Ves. 347; *Emperor of Austria v. Day*, 2 Giff. 628; *Taylor v. Barclay*, 2 Sim. 213.

(c) Taylor on Evidence, 6th ed. i. 3, 30; Wheaton, Int. Law (Lawrence), App. p. 970.

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of England (a), where it was adopted by Lord Eldon. In *Taylor v. Barclay* (b) it was falsely alleged by the plaintiff's bill that a revolted colony of Spain was "a sovereign and independent state, recognised and treated as such by His Majesty the King of these realms," the allegation being introduced to avoid a demurrer, by which a former bill founded on the same substantial facts had been met (c). It was held that the Court was bound to know that the allegation was false, and to act upon that knowledge; and a demurrer was therefore allowed. "Sound policy requires," said Shadwell, V.C., "that the Courts of the King should act in unison with the government of the King." The ground on which the demurrer was based being that a contract to lend money to a rebel so-called government, whose independence had not been recognised by Great Britain, would be void for illegality, the Court was plainly bound to act on its own judicial knowledge to avoid a breach of international law, which might in some instances amount to a *casus belli*; and the decision in *Biré v. Thompson* (d), referred to by the Vice-Chancellor, was decided upon the same principle. Every government is of course responsible, according to the law of nations, for the acts of its tribunals, and must be presumed to have given them the necessary information for their guidance. Where it has not also armed them with sufficient powers to carry out the principles of international law, it runs the risk of being compelled, in its sovereign character, to repair the omission. The deficiencies in English municipal law which led to the escape of the *Alabama* and her consorts during the American civil war, and ultimately led to the Geneva Arbitration and the passing of the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), will furnish a sufficiently modern illustration.

A foreign State, then, will be allowed to sue in an

(a) 9 Ves. 347.

(b) 2 Sim. 213.

(c) *Thompson v. Powles*, 2 Sim. 194. So a sovereign who claims the privilege of immunity as such must be reigning *de facto* at the time of the plea: *Munden v. Duke of Brunswick*, 16 L. J. Q. B. 300.

(d) Cited 2 Sim. 222. See also *Emperor of Austria v. Day*, 2 Giff. 628.

English court, either in its impersonal form or represented by its Sovereign ; and under certain exceptional circumstances, may be made a defendant. When, however, it appears as litigant in an English Court, it cannot be allowed to escape from any of the obligations incidental to the suit, or to obtain any advantage over other suitors from its peculiar character. It must sue in a form (in the words of Sir J. Leach) which makes it possible for the Court to do justice to the defendants (*a*). The provisions of Order XXXI., r. 4, of the Judicature Acts (schedule), empowering the opposite party to apply at Chambers for an order to administer interrogatories to any member or officer of a body corporate or a body of persons otherwise authorized by law to sue or be sued, in cases where such a body is party to the action, have been held to be applicable to foreign States as well as corporations (*b*). So the defendant in an action brought by such a body may apply to it to name some person from whom discovery may be obtained on its behalf; and in default of compliance, proceedings may be stayed (*c*). It was formerly necessary to make the person named defendant in a cross-suit for discovery, but now interrogatories may be administered without taking that course, under the Rule of Court already referred to. And in an old case, it was held that a foreign Sovereign, when suing in this country, might be compelled to give security for costs like any other plaintiff bringing a similar action (*d*).

The principle that Sovereigns and sovereign States are not liable to actions in municipal courts, whether domestic or foreign, for acts done in their sovereign capacity, has been extended further. Acts of sovereignty do not create any civil right or liability whatever, either in the nature

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foreign State
when litigant.

(*a*) *Columbian Government v. Rothschild*, 1 Sim. 94.

(*b*) *Republic of Costa Rica v. Erlanger*, L. R. 1 Ch. D. 171.

(*c*) *United States of America v. Wagner*, L. R. 2 Ch. 582, 589; *Republic of Peru v. Weguelin*, L. R. 20 Eq. 140. See on the old practice, *King of Spain v. Hullett*, 7 Bligh, N. S. 359, and cases there cited.

(*d*) *Emperor of Brazil v. Robinson*, 5 Dowl. P. C. 522; *King of Greece v. Wright*, 6 Dowl. P. C. 12.

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sovereignty
give rise to no
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of contract (*a*), or of tort (*b*). Thus, acts done by agents of sovereign governments, either with express authority, or with the authority implied by subsequent ratification and adoption, give rise to no contractual relation between the agents of the government on the one hand, and the other person or personality affected by the act on the other (*c*). A petition of right would seem to be the only remedy available for a wrong sustained by such person affected (*d*). The law is the same when an act is done by an agent of an independent government, either clothed with authority or supported by subsequent ratification, that would have been tortious if done by a private individual. "If," says Parke, B., in the case cited, "an individual ratifies an act done on his behalf, the nature of the act remains unchanged. It is still a mere trespass, and the party injured has his option to sue either. If the Crown ratifies an act, the character of the act becomes altered; for the ratification does not give the party injured the double opportunity of bringing his action against the agent who committed the trespass or the principal who ratified it, but a remedy against the Crown only (such as it is), and actually exempts from all liability the person who commits the trespass. Whether the remedy against the Crown is to be pursued by petition of right, or whether the injury is an act of state without remedy, except by appeal to the justice of the State which inflicts it, or by application of the individual suffering to the government of his country, to insist upon compensation from the government of the other—in either view the wrong is no longer actionable" (*e*). There must, however,

(*a*) *Doss v. Secretary of State for India*, L. R. 19 Eq. 509; *Secretary of State for India v. Kamachee Boye Sahaba*, 13 Moo. P. C. 22; *Sirdar Bhagwan Singh v. Secretary of State for India*, L. R. 2 I. App. 38; *Nabob of the Carnatio v. East India Co.*, 1 Ves. 371; *Duke of Brunswick v. King of Hanover*, 6 Beav. 1; *Elphinstone v. Bedreechund*, 1 Knapp, 316.

(*b*) *Buron v. Denman*, 2 Ex. 167.

(*c*) *Secretary of State for India v. Kamachee Boye Sahaba*, 7 Moo. Ind. App. 476; S. C. 13 Moo. P. C. 22.

(*d*) *Thomas v. The Queen*, L. R. 10 Q. B. 31.

(*e*) Per Parke, B., in *Buron v. Denman*, 2 Ex. 167, 188.

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be either previous authority or subsequent ratification ; and an agent or servant of a sovereign State will therefore be held liable for acts done by him in excess of his authority, if no subsequent ratification by his government is shewn (a). The principle itself is clearly a necessary result of the ordinary intercourse of nations. If it were not recognised, the absurdity would follow, that every member of the military and naval forces of his country would be liable to a civil action of trespass for the execution of his duty on active service. A trespass authorized by a sovereign State is, in truth, an act of war, and can only be dealt with as such.

(iii.) *Foreign Ambassadors.*

The general principle has been shewn to be that an independent Sovereign is not liable to be sued in the courts of a foreign State, unless he has in some manner waived his sovereignty and the immunity which it confers, or otherwise consented to the jurisdiction, or bears the double character of Sovereign and subject, and is sued in the latter character only. The rule and its exceptions apply with equal force whether the person of the foreign Sovereign is or is not within the jurisdiction ; though in the latter case the additional privilege of immunity from personal arrest and detention is invariably conferred on the Sovereign by public international law (b). But with the ordinary and *prima facie* immunity from action which a foreign Sovereign enjoys is often confounded another privilege, the limits of which are defined by different considerations. This privilege is the immunity of an ambassador or other authorized representative of an independent State.

The principle upon which this immunity rests is what is commonly called the fiction of extra-territoriality (*extra-territorialité*). The residence of a foreign minister within

(a) *Madrazo v. Willes*, 3 B. & Ald. 353; *The Rolla*, 6 Rob. 364.

(b) *Wheaton*, Int. Law (Dana), p. 155.

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the jurisdiction of the State to which he is accredited is, by this fiction, to which the Sovereign of the State assents by receiving him, considered as a continuing residence in his own country ; and this fictitious situation is applied, not only to the person of the minister, but to his family and suite, secretaries of legation and other secretaries, servants, movable effects, and the house in which he resides (a). The person of the minister is, moreover, entirely exempt from all civil and criminal jurisdiction (b), so that his immunity would not be affected by a mere permission under the new practice to serve the writ or notice of the writ *abroad* ; though it might be a curious subject of speculation how far such an order might be applicable to the case of an action against a subject of the country not connected with the foreign minister's establishment, but present, casually, or even as a refugee, within his house. To the general rule, that a foreign minister, his family and suite, are exempt from civil and criminal jurisdiction, Wheaton states the three following exceptions. First, the exemption does not apply to the contentious jurisdiction, so far as the person claiming the diplomatic immunity voluntarily makes himself party to an action. Secondly, he continues subject to the jurisdiction, if he is a citizen or subject of the country to which he is sent, and that country has not renounced its rights over him. Thirdly, he is subject to the jurisdiction, if he is not only entitled to the diplomatic immunity in one character, but is in another in the service of the power to which he is accredited.

Extent of
immunity.

The extent of the diplomatic immunity, which attaches, as has been said, to the whole of the minister's family and suite, is not very easily defined. It includes, however, exemption from all writs and process of the Courts, and judicial restraints upon his person, his movements, and his time. Thus it appears, not only that he cannot be brought

(a) Wheaton, Int. Law, §§ 98, 224, 235.

(b) *Magdalena Steam Co. v. Martin*, 2 E. & E. 94; 28 L. J. Q. B. 310; *Taylor v. Best*, 14 C. B. 487; 23 L. J. C. P. 89.

into court as a defendant, but that the same objection applies to his coming there as a witness ; and it is clearly laid down that he cannot be compelled to appear and give evidence, even in criminal cases (*a*). Thus, in the trial of Herbert for murder at Washington, in 1858, the minister of the Netherlands, who was an important witness to the transaction, refused to appear in Court at the request of the United States Government, who admitted his right to decline, and his own government refused to instruct him to appear as a witness, although requested to do so by the United States. The principle of his objection appears to have been, that though his testimony might have been voluntary in the first instance, yet circumstances might have subjected him to compulsion with respect to rules of cross-examination and procedure which justice to the parties implicated might require the Court to enforce. It is clear that a person entitled to the diplomatic immunity may waive the privilege by appearing in court to give ^{Waiver of} testimony, by commencing an action as plaintiff, or by ^{immunity.} voluntarily appearing to a writ and pleading otherwise than to the jurisdiction. Thus in *Taylor v. Best* (*b*), one of four co-defendants, being secretary of legation to the King of the Belgians, appeared voluntarily and pleaded to the merits. After notice of trial he obtained a rule nisi to stay further proceedings or strike his name out of the action, which was discharged, upon the ground that though he was entitled to claim diplomatic immunity, he had in fact waived his privilege by appearing and pleading, and could not afterwards rely upon what he had abandoned. The Court further laid stress upon the fact that it did not appear that the result of the action would be to interfere in any way with the person or effects of the defendant, but it is difficult to see how this could have been assumed, or how, if true, it could in any way alter the effect of the alleged waiver of the diplomatic immunity.

If an ambassador entitled to the diplomatic immunity

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(*a*) Wheaton, Int. Law (Dana), p. 306, n.
(*b*) 14 C. B. 487; 23 L. J. C. P. 89.

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waive his privilege by bringing an action, it does not appear quite clear how far he is placed in the position of an ordinary litigant. In 1816 the Court of Queen's Bench refused to make such a plaintiff give security for costs (*a*), on the ground that there was no precedent for such a course, with the exception of a case in 1727, where a similar order had been made on an ambassador's servant (*b*). The diplomatic immunity, however, extends equally to an ambassador and all the members of his suite (*c*) (with the exception to be mentioned immediately), so that there appears to be little reason for the distinction; and since the date of the decision referred to, foreign Sovereigns themselves, when suing in English Courts (*d*), have been more than once compelled to give security for their costs. The case cited would therefore probably not now be followed.

Effect of
statute

7 Anne, c. 12.

The diplomatic immunity has hitherto been treated of by the light of the principles of public international law which have been laid down by jurists and acknowledged in British Courts. They were, however, but little understood or practised until the circumstances which led to the passing of the 7 Anne, c. 12, which does in fact do little more than declare the common law on this subject (*e*). This statute was passed in consequence of the arrest of the Russian ambassador in the streets of London for a debt of trivial amount, and the diplomatic difficulties which arose out of the supposed insult to the representative of the Czar (*f*). It enacts that all writs and processes thereafter sued forth against the person of any ambassador or other public minister of a foreign State, or of any domestic servant of such ambassador or minister, or for the distraint, seizure, or attachment of their goods or chattels,

(*a*) *Duke of Montellano v. Christin*, 5 M. & S. 503; *Davies v. Solomon*, cited Tidd, Pr. 535, n. (s.)

(*b*) *Goodwin v. Archer*, 2 P. W. 452.

(*c*) *Wheaton, Int. Law (Dana)*, 306, n.

(*d*) *Emperor of Brazil v. Robinson*, 5 Dowl. P. C. 522; *King of Greece v. Wright*, 6 Dowl. P. C. 12.

(*e*) *Novello v. Toogood*, 1 B. & C. 564; *Hopkins v. Robeck*, 3 T. R. 79; *Magdalena Steam Co. v. Martin*, 2 E. & E. 94; 28 L. J. Q. B. 310.

(*f*) See the account of these circumstances in Steph. Bl. ii. 488.

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shall be null and void (sect. 1); but that no merchant or other trader whatever, within the description of any of the statutes against bankrupts, who hath put or shall put himself into the service of any such ambassador or public minister, shall have or take any manner of benefit from the Act (sect. 3). It will therefore be noticed that the servant of an ambassador may by trading waive the diplomatic immunity to which he is entitled; a liability which does not, as will be shewn below, attach to ambassadors or ministers themselves. As a matter of practice, indeed, the affidavits made by ambassadors' servants claiming the protection of the Act have generally negatived expressly the fact of the applicant being engaged in trade (a).

It has been already said that this statute was declaratory of the common law. The preamble recites that the arrest had been made "in contempt of the protection granted by Her Majesty, contrary to the law of nations, and in prejudice of the rights and privileges which ambassadors and other public ministers have at all times been thereby possessed of, and ought to be kept sacred and inviolable." The persons who shall violate the provisions of the statute itself are to be deemed "violators of the law of nations, and disturbers of the public repose." "The Act itself," said Lord Tenterden, "was only declaratory and in confirmation of the common law. It must, therefore, be construed according to the common law, of which the law of nations must be deemed a part" (b). The same view is taken of the scope and effect of the statute by Lord Campbell, C.J., in *Magdalena Steam Navigation Co. v. Martin* (c). So far as regards the immunity of those persons who are the subjects of this legislation, the authorities on international law cited above shew that this view is a correct one; but there is considerably more doubt

Distinction
between am-
bassadors and
ambassadors'
servants.

(a) *Malachi Carolino's Case*, 1 Wils. 78; *Hopkins v. De Robeck*, 3 T. R. 79; *Vireash v. Becker*, 3 M. & S. 284.

(b) *Novello v. Toogood*, 1 B. & C. 554.

(c) 28 L. J. Q. B. 310; 2 E. & E. 94. See also *Hopkins v. De Robeck*, 3 T. R. 79.

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about the third section, which prevents "*traders*" from taking or deriving any benefit from the Act as servants of an embassy. The rule of international law appears to be, as will be shewn below, that the diplomatic immunity of an ambassador cannot be waived by his entering into trade, although it has been already seen that an independent Sovereign can waive his immunity by a similar course. The reason of the distinction may be that the privilege of an ambassador is not his own, but something entrusted to him for the mutual benefit of the country which he represents and that to which he is accredited; and therefore that it cannot be waived by his entering into commercial relations with those amongst whom he dwells—a practice which, when adopted by members of a diplomatic body, is always viewed with disfavour (a). Whatever the reason of the rule, it would almost certainly have applied, on the principles of international law alone, to the servants of ambassadors and the ambassadors themselves equally; and the statute therefore does make a distinction between ambassadors and their servants which the common law itself would never have drawn.

The statute, however, now defines the extent and manner of the recognition to be given to the rules of public international law on this particular subject, and must be taken in substitution for them. "It must be considered," says Lord Ellenborough, "as declaratory not only of what the law of nations is, but of the extent to which that law is to be carried" (b). It has been repeatedly held that in order to take advantage of it, the claimant must be actually and *bonâ fide* in the service of the foreign minister, and that no colourable or collusive employment will do (c). The fact of the service, and its nature, must, it seems, be established by affidavit (d); and where a physician, during the pendency of a writ of

Service of
ambassadors
contemplated
by statute

must be
actual and
bonâ fide.

(a) Wheaton, Int. Law (Dana), ss. 306, 307. (b) 3 M. & S. 298.
(c) *Cross v. Talbot*, 8 Mod. 288; *Evans v. Higgs*, 2 Str. 797; *Seacomb v. Bowley*, 1 Wils. 20; *Darling v. Atkins*, 3 Wils. 33; *Delvalle v. Plumer*, 3 Camp. 47.

(d) *Malachi Carolino's Case*, 1 Wils. 78.

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error on a judgment which had been recovered against him, obtained a retainer to serve the Bavarian minister at a salary of £40 a year, and swore that he had not since accepting it prescribed for or advised any other patients, he was held not to be entitled to the protection he claimed (*a*). The law is, in short, that the process of the law shall not take a *bonâ fide* servant of a foreign minister out of his service, but that nevertheless a foreign minister shall not take a person who is not his *bonâ fide* servant out of the custody of the law, or in any way screen him from the payment of his just debts (*b*). Such *bonâ fide* servants need not be in the habit of sleeping in the house of the minister, provided that they are in his actual service (*c*) ; and it seems that a chorister, *bonâ fide* employed by an ambassador in the performance of religious worship in his chapel, is a servant for the purposes of this Act (*d*).

It is not enough to state that the name of the person who claims immunity as an ambassador's servant was registered at the office of the Secretary of State, and thence transmitted to the Sheriff's office, since an actual service must be disclosed upon the affidavits (*e*), though it is not, of course, necessary that every particular act or habit of service should be specified ; and if service is *prima facie* shewn, the presumption will be, in the absence of further evidence, that it is not colourable or collusive (*f*). But unless the name of the claimant has been so registered in the office of the Secretary of State, and transmitted to the Sheriff's office, it appears that the sheriff or sheriff's officer making the arrest is not liable to the summary proceedings provided by way of punishment in sect. 4 of the Act (*g*) ; nor will the mere fact that the defendant has been appointed chaplain to a foreign ambassador or

Service to be
shewn on
affidavit.

(*a*) *Lockwood v. Coysgarne*, 3 Burr. 1676.

(*b*) *Heathfield v. Chilton*, 4 Burr. 2016.

(*c*) *Wedmore v. Alvarez*, 2 Str. 797 ; *Evans v. Higgs*, *ib.* ; *Darling v. Atkins*, 3 Wils. 33 ; *Novello v. Toogood*, 1 B. & C. 562.

(*d*) *Fisher v. Begrez*, 1 C. & M. 117.

(*e*) *Fisher v. Begrez*, 1 C. & M. 117.

(*f*) *Triquet v. Bath*, 3 Burr. 1478.

(*g*) *Seacombe v. Bowley*, 1 Wils. 20.

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minister entitle him to protection, unless it is shewn that he does duty as such chaplain (*a*). In a case where the wife of the defendant was arrested under a writ issued against both, the defendant swore that before and at the time the writ was issued he was in the actual employment of the ambassador to the King of Spain, as second secretary to the embassy; that his employment consisted in writing despatches and other official documents for the ambassador, and that he was in daily attendance upon him (*b*). The Court refused to quash the writ, Abbott, C.J., on the ground that the affidavit did not state that the defendant was a domestic servant of the ambassador, or employed in the ambassador's house; Holroyd, J., also on the ground that the writ was not absolutely void because it had issued, unless or until put in force by an arrest. It is difficult, however, to see that the affidavit was defective in any material particular, and the other reason on which the judgment of Holroyd, J., proceeded is directly contrary to the express words of the statute, which provide that all writs thereafter sued forth or prosecuted, whereby the domestic servant of any ambassador or public minister may be arrested or imprisoned or his goods and chattels may be seized, distrained, or attached, shall be deemed and adjudged to be utterly null and void, to all intents, constructions, and purposes whatsoever (*c*). The case is said to have been one of considerable suspicion, and must probably be regarded as an instance of the law being strained to fulfil the presumed requirements of expediency and moral justice.

**Extent of
statutory
immunity.**

The privilege of immunity is expressly conferred upon the goods as well as the person of all who are entitled to it, but this exemption does not attach to all such goods without qualification. Where the claimant of the privilege, as chorister to a foreign ambassador, resided in a

(*a*) *Ib.* A person in the navy cannot, it seems, be a domestic servant to an ambassador: *Darling v. Atkins*, 3 Wils. 33.

(*b*) *English v. Caballero*, 3 Dowl. & R. 25. In *Carolino's Case*, 1 Wils. 78, it was held that an interpreter was not a domestic servant.

(*c*) 7 Anne, c. 12, s. 3.

separate house, part of which he let out as lodgings, was a teacher of music and languages, and also acted as prompter at one of the London theatres, it was held that his goods in that house, not being necessary for the convenience of the ambassador, or for the due performance of the claimant's service, were liable to be distrained for poor-rate (*a*). In this case the Court seems to have considered that the goods seized were possessed by the claimant, not in his capacity of ambassador's servant, but in some other character. The question how far the protection of the statute attached to goods of an ambassador's servant *dehors* the house of the ambassador was also raised in *Fisher v. Begrez* (*b*), but it was unnecessary to decide it, the Court coming to the conclusion that the affidavits did not sufficiently shew that the claimant was a domestic servant to the ambassador at all; and that the fact that his name was included in the list which had been registered in the office of the Secretary of State, and transmitted to the sheriff's office, was insufficient. The object of that list, it was said, was to call the attention of the sheriff to the names registered, and to protect him, in case the party against whom he should execute process should claim the diplomatic immunity without having been registered (*c*).

The statutory immunity conferred by this Act does not attach to consuls (*d*), and must in strictness be confined to those whom it mentions, namely, ambassadors or public ministers and their domestic servants. It has already been said that in general writers on public international law consider that it properly belongs to the wife and family, servants and suite, of the minister, as well as to all persons attached to the legation or embassy; but it must be very doubtful how far any protection, beyond that conferred by the statute, can be claimed in an English court. "I cannot help thinking," said Lord Ellenborough,

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Statutory
immunity not
extended to
consuls.

(*a*) *Novello v. Toogood*, 1 B. & C. 554. (*b*) 1 C. & M. 117.

(*c*) *Fisher v. Begrez*, 1 C. & M. 127; *Hopkins v. De Robeck*, 3 T. R. 79, 80; *Delvalle v. Plumer*, 3 Camp. 48.

(*d*) *Viveash v. Becker*, 3 M. & S. 284; *Clarke v. Cretico*, 1 Taunt. 105.

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that the Act of Parliament which mentions only ambassadors and public ministers, and which was passed at a time when it was an object studiously to comprehend all kinds of public ministers entitled to these privileges, must be considered as declaratory not only of what the law of nations is, but of the extent to which that law is to be carried." These considerations, however, can only apply to the issue and service of the writs to which the statute is confined, and to such persons as the legislature may fairly be taken to have contemplated, and not to extraordinary representatives of a foreign government whose office has been called into existence by a special occasion. Thus in *Service v. Castaneda* (a), it was held that an injunction could not be sustained against the agent of a foreign government, whose business in this country was only that of settling certain claims upon the government he represented, and whose acts in that capacity were done entirely under the control of the ambassador of that government resident in England. "If the statute of Anne," said the Vice-Chancellor, "does not apply to this particular case, the common law does."

Common-law
immunity
from suit—
not affected
by statute.

It will be observed that the Act refers only to the issue and service of writs whereby the person or goods of ambassadors or their servants may be seized or attached. It was not intended by it to abridge the immunity given to ambassadors by the law of nations, that they shall not be impleaded in the courts of the country to which they are accredited (b). Not only is this a principle of international law, but it was expressly laid down by Lord Campbell in 1859 that a public minister duly accredited to the British Crown by a foreign State is privileged from all liability to be sued here, quite apart from the operation of the statute of Anne (c); and this principle may of course be extended, theoretically speaking, to the ambassador's family and suite, and members of the legation,

(a) 2 Coll. 56.

(b) *Per Lord Campbell*, 28 L. J. Q. B. 310, 315.

(c) *Magdalena Steam Navigation Co. v. Martin*, 28 L. J. 310.

though there is no English authority practically carrying the doctrine further than the case just cited. In *Taylor v. Best* (a), indeed, the Court had hesitated to carry it so far, and while holding that the defendant had waived his privilege, if any existed, by appearance and plea, left it doubtful whether an ambassador could be sued at all by process not affecting his person or his goods, when there had been no such waiver.

The case just referred to is an authority for the proposition that an ambassador does not lose his privilege by trading in the country to which he is accredited, which has been already stated. "The privilege," said Jervis, C.J., "is not in the case of a minister, interfered with or abandoned by the circumstance of trading, as it would be if the claim were set up in respect of the privileges of a servant of the ambassador under the statute of Anne. If an ambassador or minister violate the character in which he is delegated to this country, by entering into commercial transactions, that raises a question between the country to which he is sent and the country from which he is sent; but he does not thereby lose any privilege to which he may be entitled; the privilege being a general privilege, and the limitation attached to the privilege, by reason of trading, being confined by the statute of Anne to the case of servants of the ambassador, who may lose the privilege" (b). It was, however, held that the defendant in this case had lost his privilege by not taking the objection at an earlier stage of the action, and a rule to strike his name out of the record was consequently discharged.

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(a) 23 L. J. C. P. 89.

(b) *Taylor v. Best*, 23 L. J. C. P. 89, 93; 14 C. B. 487; *Barbuil's Case*, Cas. temp. Talbot, 281.

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PERSONS.****CAP. V.****SUMMARY.****FOREIGN CORPORATIONS, STATES, SOVEREIGNS, AND
AMBASSADORS.**

(i.) *Foreign Corporations.*—The artificial personalities or corporate bodies which are created by the municipal laws of foreign States are recognised in English courts, when their character is substantially the same as that of a corporation created by English law.

pp. 71, 72. A foreign corporate body may therefore sue and be sued in England under its corporate name; and the provisions in the Rules under the Judicature Acts, for service of a writ of summons or notice thereof abroad, apply to these artificial as well as to natural persons.

p. 76. Where a foreign corporation carries on business at a branch office in England, with a clerk or officer in the nature of a head officer there, whose knowledge would be the knowledge of the corporation, service of a writ may be effected on such officer. If there is no such officer in England, notice of the writ should be served on the head office of the corporation abroad.

pp. 77, 78. The recognition accorded by English Courts to foreign corporations does not, except as above stated, expose them to the operation of the English enactments regulating English corporations; unless, it seems, their creation proceeded from the laws of a jurisdiction subordinate to the British Crown.

pp. 78-86. A foreign corporation, though incapable of domicil in the strict sense, may reside beyond the limits of the State which created it. Except perhaps for the purposes of jurisdiction and service of process, a foreign corporation resides only in the principal seat of its business. Such residence is a question of fact, in which the locality of its incorporation and registration, the seat of its governing body, and the place where its profits are made, realised, or remitted, are all elements to be considered. Foreign cor-

porations, when litigant in an English court, occupy the same position with regard to the conduct of the action as natural persons, and may be compelled to make discovery and answer interrogatories by a proper representative.

(ii.) *Foreign States and Sovereigns.*—Foreign States, or pp. 87, 88. bodies politic created by international law, occupy a position analogous to that of foreign corporations. In the case of monarchical governments, the Sovereign may be regarded as a corporation sole, representing the State; in the case of democratic or republican governments, the State itself, under its international name or style, as a body politic, may be regarded as a corporation aggregate.

The sovereign power of a State, in either of these two pp. 88-92. cases, may sue in an English court under its quasi-corporate or politic name in respect of the public property and *chooses in action* of the nation which it represents. The Sovereign, in the case of a monarchical government, may also sue in respect of his private rights and property as a private individual; but the practice has been hitherto not to give a Sovereign litigant, though successful, his costs.

Neither a personal Sovereign nor a body politic (or pp. 92-97. State) may be sued in an English court, unless the privilege of sovereignty has been waived, expressly or impliedly, by voluntary submission to the jurisdiction or otherwise.

But when a foreign Sovereign is also, in another capacity, pp. 94, 101. the subject of another sovereign State, he may be sued in the courts of that other State, if not in the courts of all States except his own, in respect of acts done by him in that subject and private capacity; though the *prima facie* presumption, with respect to all his acts, is that they were done by him in his character of Sovereign.

A foreign Sovereign or State, when litigant in an English court, occupies the same position, with respect to discovery and the other incidents of the suit, as a private individual.

The sovereignty and independence of an alleged Sovereign or body politic are matters which an English Court pp. 101-103.

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should know or ascertain judicially; and evidence to prove these facts need not, it appears, be offered by the parties to the action.

pp. 103-105. Acts of State, authorized or ratified by a sovereign power, create no civil rights or liabilities.

pp. 105-108. (iii.) *Foreign Ambassadors.*—Foreign ambassadors or ministers, with their families, officials, suites, servants and attendants, are, by the fiction of *extraterritorialité*, regarded as continuously resident in the State of which they are the representatives. Foreign ambassadors or ministers are, by international law, exempt from being sued or impleaded for any cause whatever in the courts of the State to which they are accredited. There is no English authority expressly extending this immunity to the inferior members of the legation, or to their families, suites, and servants; but it is so extended by writers on international law.

p. 115. A foreign ambassador or minister does not lose this immunity, or waive his privilege, by engaging in trade; though the statutory protection given to the servants of ambassadors or ministers, and therefore by implication their common law immunity, is forfeited by such a course of action. The immunity may, however, be waived by appearing and pleading; and a privileged person, by taking such a course, places himself in the position of an ordinary litigant. The extent of this immunity, though not clearly defined by English precedents, is by writers on international law treated as including all writs and processes of court, and all judicial restraints upon the time, movements, or person of those entitled to the privilege.

p. 108. The rules of international law on this subject, adopted by the common law of England, have been amplified by statute (7 Anne c. 12); which declares all writs and processes, sued out against the person or goods of any foreign minister or ambassador, or of any domestic servant of such ambassador or minister, to be null and void. This statutory protection may be forfeited, in the case of the servant of an ambassador or minister, by engaging in trade.

To be entitled to this statutory protection as the domestic servant of an ambassador or minister, the claimant must be actually and *bonâ fide* in such service, and no colourable or collusive employment will do. The nature of the employment or service is in each case a question of fact; and proof that the claimant's name has been registered as such servant at the office of the Secretary of State, and thence transmitted to the office of the Sheriff, is insufficient evidence of that fact.

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pp. 110-112.

Part II.—PROPERTY.**CHAPTER VI.****IMMOVABLE PROPERTY.****(i.) Jurisdiction as to Immovable Property situated Abroad.**

Prevalence of the *lex situs*. THE primary principle of private international law with relation to land, regarded as property, is that the *lex situs* or *lex rei sitae*—that is, the law of the country of which the land in question forms an integral part—is the only law which can or ought to affect it. If real property could always be regarded in this simple light, freed from its many complicated relations with the contracts, acts, and capacities of persons, no conflict of law would ever arise with regard to it; but these necessary relations have brought about considerable modification in the primary principle just laid down. The principle itself arises from the conception of international law known as *eminent domain*, by which is meant that the proprietary right of every sovereign State is not only *absolute* within its territorial limits, so as to exclude that of other nations, but also *paramount* with respect to the members of the State itself, so as to include the right, in case of necessity or for the public safety, of disposing of all the property of every kind within the same limits (Wheaton, Int. Law, § 163). It need hardly be pointed out that in England such a theory must be regarded as derived directly from the feudal law, according to which the right of the Crown over its territory was, in the first instance, *absolute* not only to the exclusion of other Sovereigns but also of its own subjects, who afterwards obtained their qualified rights in

the soil by its mere grace and favour. From the conception itself it naturally follows that the title to real property can be acquired, passed, and lost, only according to the law of the Sovereign who has such paramount domain over it (Story, Conflict of Laws, § 424); and an additional reason for the principle, independent of theory, arises from the obvious fact that no other sovereign State has the power of employing force to execute such of its laws, or such of the decrees of its tribunals, as affect to deal with land situated beyond its own limits.

The distinction between real and personal laws, so much insisted upon by the older jurists, and which is discussed at some length by Mr. Westlake (Priv. Int. Law, §§ 141-143), is not of any importance in connection with this division of the subject; and would rather lead to embarrassment, as, in the phraseology of the jurists alluded to, *real* laws are those "*quæ disponunt circa res*," *personal* laws, those "*quæ disponunt circa personas*" (a), and the word "*real*" is used not to distinguish immovable from movable property, but property generally from persons. As to immovables, however, Story says that in the main proposition as to the prevalence of the *lex situs*, foreign jurists generally concur (Story, Conflict of Laws, § 427). It remains to see what modifications of the rule are accepted in English law.

As regards the right either to the possession of or the property in land, not only must the *lex situs* prevail, but the *forum situs* is the only one in which such a right can be tried; and in accordance with this principle, the English Courts never assume jurisdiction to deal directly either with the possession or property in foreign realty. (Story, Conflict of Laws, § 428; Westlake, Priv. Int. Law, 61, 62). But where the foreign land can be acted upon indirectly through a person who has placed himself within the jurisdiction, the English Courts, acting *in personam* and not *in rem*, will make decrees, upon the ground of a contract or other equity subsisting between the parties,

(a) Bartolus, ad Cod. I. 1.

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respecting property situated out of the jurisdiction (a). Thus, a foreclosure decree being a decree *in personam* depriving the mortgagee of his personal right to redeem, the English Court of Chancery has jurisdiction to make such a decree in respect of a mortgage, between an English mortgagor and mortgagee, of land in the Colonies (b). In that case Bacon, V.C., said : "As I am satisfied that jurisdiction has been very often assumed in the case of appointing receivers of mortgaged estates in the Colonies, and as I cannot doubt that the Court has a right as between the English mortgagor and the English mortgagee to enforce a personal contract between them, although one of the consequences of so doing may be to vest in the plaintiff the absolute interest in the mortgaged estate, which at present is qualified only by the existence of the equity of redemption, I cannot hesitate for a moment in saying that the suit which is brought for the purpose of having the account taken, of realizing the estate if it should be necessary, and giving to the mortgagee the opportunity of redeeming it if he thinks fit to do so, is properly brought in this court. Upon the question of jurisdiction, there is, in my opinion, no reason whatever for doubt." The judgment of Lord Romilly in *Norris v. Chambers* (c) was relied upon in denial of the jurisdiction, but in that case the attempt was to obtain an enforcement of lien on an estate in Prussia belonging to a stranger, independently (as Lord Romilly expressly said) of all personal equity attaching upon him. And in the same case, on appeal, Lord Campbell said that, had any contract or privity been proved, the plaintiff would have been entitled to succeed (d), further laying down that an English Court ought not to pronounce a decree, even *in personam*, which can have no specific operation without the intervention of a foreign Court, and which, in the country where the lands lie which it assumes to charge, would probably be treated

(a) *Penn v. Baltimore*, 1 Ves. Sen. 444; *Scott v. Nesbitt*, 14 Ves. 438; *Maunder v. Lloyd*, 2 J. & H. 718.

(b) *Paget v. Ede*, L. R. 18 Eq. 118, 126.

(c) 30 L. J. Ch. 285.

(d) 3 D. F. & J. 584.

as *brutum fulmen*. And in accordance with these principles, a bill cannot be maintained in England to administer the trusts of a Scotch creditor's deed, under which a mining business in Scotland was to be carried on by a trustee (a). In the case last cited, Lord Romilly laid down that the Court would never interfere with a contract, unless the domicil of the defendant, or the situation of the subject-matter, or the place where the contract was entered into, warranted such interference ; unless, that is, it was the *forum domicilii*, the *forum rei sitae*, or the *forum loci contractus celebrati*. This case was subsequently followed by Malins, V.C., who allowed a plea to the jurisdiction where the contract had been entered into at Boulogne, between the plaintiff, who was resident there, and an Irishman, relating to real property in Ireland (b). Unless, therefore, the person on whom it is sought to enforce an equity regarding foreign land is domiciled in England, or has entered into a contract in England respecting the same property, the Court will not assume jurisdiction to compel him to do any act with regard to it (c). But an order made by the Supreme Consular Court at Constantinople that the receiver appointed of a partnership between English subjects should sell by auction land in Turkey held by the partners in the name of a Turkish subject, was held to be not *ultra vires* (d). The Court undoubtedly had jurisdiction *in personam*, but a protocol had been issued by the Turkish Government—of which the partners had not availed themselves—enabling for the first time British subjects to hold land in Turkey, but declaring that they should then be amenable to the Turkish Courts only in regard to all questions relating to it. The Consular Court, however, being the proper one to control the persons of the parties, it was held immaterial that the

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Conditions
necessary for
the exercise
of this
jurisdiction.

(a) *Cookney v. Anderson*, 31 Beav. 452.

(b) *Blake v. Blake*, 18 W. R. 944; *Re Holmes*, 2 J. & H. 527.

(c) *Matthaei v. Galitzin*, L. R. 18 Eq. 340. As to the proper forum in which to recover a debt made a charge on foreign territory (Oude), see *per* Malins, V.C.; *Doss v. Secretary of State for India*, L. R. 19 Eq. 509, 535.

(d) *Abbott v. Abbott*, L. R. 6 P. C. 220.

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*Jurisdiction
as to Land.*

Colonial land
not to be
affected by
Petition of
Right in
England.

Turkish Government assumed to itself all jurisdiction in respect of real estate in Turkey held by them, either in their own names or in that of a Turkish subject.

In the case of *Re Holmes* (*a*), which was one of petition of right, a demurrer was allowed on the ground, *inter alia*, that the Queen was as much resident in Canada as in England, and that the subject-matter of the petition being Canadian land, the Canadian Court was the proper forum in which to sue. The suppliants there sought to establish the jurisdiction of the Court by applying the principle laid down in *Penn v. Lord Baltimore* (*b*) as to the power of equity to affect foreign land by acting *in personam* of its justiciables, to Her Majesty, by virtue of the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 1, which enacts that a petition of right may be intituled in any one of the superior Courts in which the subject-matter of such petition would have been cognizable, if the same had been a dispute between subject and subject. The decision of Lord Hatherley, however, rested on the broad ground that, for the purpose of any claims to Canadian lands under Canadian statutes, the Queen was not to be regarded as within the jurisdiction of the Court, and that it was not the object of the Petitions of Right Act, 1860, to transfer jurisdiction to this country from any colony in which an Act might be passed vesting lands in the Crown for the benefit of the colony (*c*). And in *Reiner v. Marquis of Salisbury* (*d*) it was decided that a bill of discovery could not be maintained in England, in aid of proceedings about to be taken in England for the recovery of land in India, intended to be by petition of right, on the ground that a plaintiff must shew a title to sue in order to obtain discovery, and that he could not sue for the Indian lands in an English court.

English
contracts
upon con-
science of its
justiciable.

In *Cranstoun v. Johnston* (*e*) a sale of real estate in one of the West Indian islands by a creditor who had fraudu-

(*a*) 2 J. & H. 527.

(*b*) 1 Ves. Sen. 444.

(*c*) See *Doss v. Secretary of State for India*, L. R. 19 Eq. 509.

(*d*) L. R. 2 Ch. D. 378.

(*e*) 3 Ves. 170; S.C. 5 Ves. 277; *Jackson v. Petrie*, 10 Ves. 161.

lently obtained a judgment there against an absent debtor was set aside. The Master of the Rolls in that case said, "It was not much litigated that Courts of equity here have an equal right to interfere with regard to judgments or mortgages upon lands in a foreign country as upon lands here . . . The only distinction is, that this Court cannot act upon the land directly, but upon the conscience of the person living here: *Archer v. Preston*, cited 1 Vern. 77; *Arglasse v. Muschamp*, 1 Vern. 75; *Kildare v. Eustace*, 1 Vern. 419, and 1 Eq. Cas. Ab. 133. These cases clearly shew, that with regard to any contract made by, or equity between, persons in this country respecting lands in a foreign country, particularly in the British dominions, this Court will hold the same jurisdiction as if they were situated in England; and Lord Hardwicke lays down the same doctrine in *Foster v. Vassall*, 3 Atk. 589."

The distinction alluded to by Sir R. Arden, M.R., in the quotation just made, between lands situated within the empire or colonies and lands wholly foreign, derives some support from the language used in *Foster v. Vassall* (a), but does not appear to have any other foundation. In *Angus v. Angus* (b), where a bill was filed relating to lands in Scotland, Lord Hardwicke said that, since the Court acted upon the person, it would have been a good bill, as to fraud and discovery, *if the lands had been in France*, if the person were resident in England. All lands out of the jurisdiction stand upon the same footing (c), and as to these, there are abundant examples of equities being enforced. There must, however, be an equity which the English Court can lay hold of, and this principle is well explained by Lord Selborne in *Harrison v. Harrison* (d). That was a case where a Scotch heir elected to take the Scotch real estate by inheritance in opposition to an English will, under which he would have been entitled to a legacy, and it was held on appeal that the liability of the Scotch real estate to the payment of

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(a) 3 Atk. 589.
(b) West's Rep. 23.

(c) *Roberdean v. Rous*, 1 Atk. 543.
(d) L. R. 8 Ch. 342.

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debts, as between the heir and the legatees, was to be determined by the Scotch law. It followed that as the Scotch law threw the general debts primarily on the real estate, there could be no marshalling in the English Court against the Scotch heir in favour of the pecuniary legatees, and the Scotch real estate was further exempted from any share in the general costs of the suit. Lord Selborne said in his judgment (a): "The doctrine of marshalling as applied in favour of legatees against heirs-at-law taking descended real estate in England is part of the *lex loci* affecting those real estates, and no question of conflict of law can arise under those circumstances. It is a wholly different thing when persons who have an interest in the personal estate only endeavour indirectly to establish in their own favour, or for their own relief, a burthen upon real estate situate in another country, which, by the law of that country, would not be administered so as to give them what they ask The legatees ask that by virtue of the English doctrine of equity, applicable to the administration of English real estate descended when personal legatees would be disappointed by the payment of creditors out of their fund, these legatees may be declared entitled to acquire the rights of creditors against the Scotch real estate. It is clear that in Scotland they would have no such right; and to me it seems equally clear that unless they have such a right in Scotland the law of England cannot give it to them. It is admitted, as I understand, that the burthen of liability to debts, so far as relates to real estate, can only be created by the *lex loci rei sitae*; but it is suggested that the burthen may be laid on real estate on which it is not imposed by the *lex loci rei sitae* by an indirect equity in favour of the legatees, because the creditors who have been paid might have pursued their own rights against the real estate without waiting, in the first instance, to see whether there was personal estate or not. It seems quite impossible that this can be correct; because, in the first place,

(a) L. R. 8 Ch. p. 348.

as against the real estate in Scotland the Courts of England have no jurisdiction at all. Any jurisdiction which they can exercise as to the real estate in Scotland can only be through the medium of some personal equity attaching to the owner in Scotland of that real estate, who, in this case, is the Scotch heir. What is that personal equity? There is no fiduciary relation. What right have these legatees, upon the footing of personal equity, to say that the heir shall not enjoy the Scotch real estate as the law of Scotland gives it to him, or that any burthen shall directly or indirectly be thrown upon that real estate in their favour, which would not be imposed by the law of Scotland? It seems to me quite clear that this Court cannot find any such equity upon the accident of this heir-at-law being before it as a party to the suit. The equity must be founded upon some higher principle. The fallacy which pervaded the whole of the argument for the respondent was this, that it was assumed that the Scotch estate was properly brought into this Court as the forum of administration. But without first shewing what this Court has to do with respect to the Scotch real estate, and why it ought to be done, the proposition is not made out. There are, in point of fact, no debts to be paid out of the Scotch real estate; there are no trusts to be executed as to the Scotch real estate; there is no contract to be enforced as to the Scotch real estate."

The rule which is therefore to be drawn from the decision of Lord Selborne just quoted (with which Lord Justice Mellish concurred), is, that in order to affect real estate situate abroad with an equity which does not attach to it by the *lex loci rei sitae*, there must be a privity shewn to exist between the parties seeking to establish the equity and the owner of that real estate, and that it must be a privity which arises either from contract or from the existence of a fiduciary relation between the parties. According to the cases just cited (a), it is also necessary that the defendant at least should be domiciled in this country, or that the cognisable by

(a) *Cookney v. Anderson*, 31 Beav. 452; *Blake v. Blake*, 18 W. R. 944; *Matthaei v. Galitzin*, L. R. 18 Eq. 340.

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as to Land.*

an English
Court.

Equities
enforced.

contract out of which the privity arises should have been entered into here. Mr. Westlake says that it may probably be laid down as a principle, as it is certainly demanded by the very nature of sovereignty, that the jurisdiction of the English Courts will not be exercised as to persons domiciled abroad, and as to their conduct abroad, even though process may have been served on them here (a). And this being a general rule, it would be so *à fortiori* in cases relating to real estate situate abroad, which there would be no pretence for affecting indirectly through the person of the owner, unless that owner were either domiciled within the jurisdiction, or had entered into a contract within its limits in relation to the real estate which it was sought to affect.

Subject to these restrictions, there have been abundant examples of equities being enforced in relation to real estate situate abroad. Thus trusts will be enforced, though affecting foreign lands (b), accounts taken between tenants in common for waste and generally (c), and contracts for sale ordered to be specifically performed (d). But foreign boundaries will not be settled (e), nor will partition of foreign lands be decreed (f), nor will an issue be directed to try the validity of a will of lands lying out of the jurisdiction (g). And a suit to enforce a lien on real estate in Prussia cannot be sustained unless there is some privity of contract between the parties to it. In such a case, a declaration of lien will be made, and the Court will in some cases appoint a receiver; but it will be left to the plaintiff to make it available, if he can, by means of the foreign tribunals (h). In the case of *Holmes v. Regina* (i),

(a) Westlake, Priv. Int. Law, § 127; see the cases cited in *Hendrick v. Wood*, 9 W. R. 588.

(b) *Kildare v. Hustace*, 1 Vern. 422.

(c) *Carteret v. Petty*, 2 Swans. 323, n; *Roberdean v. Rous*, 1 Atk. 543.

(d) *Archer v. Preston*, 1 Vern. 77; *Jackson v. Petrie*, 10 Ves. 164; see note to *Penn v. Baltimore*, 1 Tud. L. C., for further examples.

(e) *Penn v. Baltimore*, 1 Ves. Sen. 444; see *Tulloch v. Hartley*, 1 Y. & C. C. C. 114.

(f) *Cartwright v. Pettus*, 2 Ch. Cas. 214.

(g) *Pike v. Hoare*, 2 Eden, 182.

(h) *Norris v. Chambres*, 30 L. J. Ch. 285.

(i) 31 L. J. Ch. 58; 2 J. & H. 527.

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certain lands in the colonies were vested in the Queen by an Act of the provincial legislature, and it was held that the Courts of this country, acting *in personam*, had not jurisdiction to entertain a petition of right in respect of such lands, praying for a reconveyance of part of them to the suppliants on equitable grounds. A power was formerly assumed of granting sequestrations against the estates of defendants situated in Ireland (a), but these cases are of doubtful authority, and the observations of Lord Brougham on the judgment in the latter case, in *Portarlington v. Soulby* (b), shew that they would not now be followed. In the late case of *Whitaker v. Forbes* (c) it was held that an action of debt for a rent-charge on lands situate in Australia was not maintainable in England, but this was on the ground that such an action was local and not transitory in its nature, and that the rules of venue, which had not then been abolished, would prevent it from being tried anywhere but in the *forum situs*. It was contended in that case, in the argument on appeal, that the rule as to an action for rent-charge being local did not apply to cases where the land was situated out of England; but Lord Cairns denied that there was, either in principle or authority, any ground for such a proposition. In *Phillips v. Eyre* (d), Willes, J., said : "Our courts are said to be more open to admit actions founded upon foreign transactions than those of any European country ; but there are restrictions in respect of locality which exclude some foreign causes of action altogether, namely, those which would be local if they arose in England, such as trespass to land (*Doulson v. Matthews*, 4 T. R. 503)." These particular restrictions, in respect of venue, have now been removed by the Judicature Act, 1875, Order xxxvi., r. 1. In the late case of *Buenos Ayres Railway Co. v. Northern Railway of Buenos Ayres Co.* (e), the plaintiff and defendant companies were both registered and had their offices

Abolition of
rules of venue.

(a) *Arglasse v. Muschamp*, 1 Vern. 75 ; *Fryer v. Bernard*, 2 P. Wms. 261.

(b) 3 My. & K. 109.

(d) L. R. 6 Q. B. 1, 28.

(c) L. R. 10 C. P. 583 ; 1 C. P. D. 51.

(e) 36 L. T. 148.

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in England, and the action was brought on a contract for the use and occupation of land and buildings within the dominions of the Argentine Republic. The statement of defence alleged these facts, and further that both companies were domiciled in the Argentine Republic, where the alleged contract was made, and that the Government of that State had "assumed jurisdiction" in the matter. It was contended, that as the claim of the plaintiffs related to immovable property and rights incident to immovable property situated in a foreign country, the High Court of Justice had not jurisdiction over the same; and that for it to assume to adjudicate thereon would under the above circumstances be a violation of the comity of nations. A further contention was set up that the claim could not be conveniently disposed of in England, inasmuch as the contract sued on had been made abroad, and was therefore subject to the law of the *locus contractus*. This defence was held bad on demurrer, Mellor, J., saying that there was nothing in it to establish that jurisdiction over the subject-matter of the claim was, either by law or by contract of the parties, vested exclusively in the Courts of the Argentine Republic.

Trusts enforced when trustees justiciable.

It was said above that trusts respecting lands out of the jurisdiction will be enforced by the Court of Chancery, but this will obviously be so only when the trustees are persons on whom the Court can effectually act, and if there are no such trustees, no trust can be settled or enforced. In *New v. Bonaker* (a), a testator gave certain funds to the President and Vice-President of the United States, and the Governor of Pennsylvania, to build and endow a college for special purposes in Pennsylvania. The trustees having disclaimed, Malins, V.C., refused to attempt to settle a scheme for the administration of the trust, and held that the funds bequeathed fell into the residuary estate. The ground, however, of the decision was rather the principle of *Attorney-General v. Sturge* (b), that it does not fall within the province or power of the

(a) L. R. 4 Eq. 655.

(b) 19 Beav. 597.

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as to Land.*

Interference
with actions
in the *forum
situs*.

Court to see to the administration of a foreign charity, than the fact that the trust contemplated the acquisition and holding of foreign land for a particular purpose.

With regard to injunctions to restrain proceedings abroad for the recovery of real estate, the Court will grant them at its discretion, if there is reason to believe that all the matters in dispute will be better determined in England, and the parties are before the Court, so as to be controlled by it effectually (*a*). In the more recent case of *Hope v. Carnegie* (*b*), a British subject, entitled to real and personal estate, both in England and the Netherlands, died domiciled in England, leaving a will by which he gave to trustees all his property here and abroad, but as to his foreign property only so far as he could dispose of it according to the *lex rei sitae*. A decree was made in England for the administration of his estate, and subsequently one of his children instituted proceedings in the Netherlands for the administration of his real and personal estate in that country. It was held by Knight Bruce, V.C., that the proceedings in the Netherlands ought to be restrained as to the personal estate, but not as to the realty, leaving them to be carried on separately as to that, if possible; but Turner, V.C., thought that the proceedings ought to be restrained as to the real estate abroad also, on the analogy of *Bunbury v. Bunbury* (*a*).

The balance of authority, however, is certainly against any interference with the *forum situs*, so far as regards realty, though the jurisdiction has always been asserted. The question was much discussed in *The Carron Iron Company v. Maclaren* (*c*), where the cases on the subject are carefully examined by Lord St. Leonards. In *Bushby v. Munday* (*d*), proceedings in Scotland on a Scotch heritable bond were restrained by Sir John Leach, on the ground that the validity of the bond could best be decided in England; but a similar injunction was dissolved by

(*a*) *Bunbury v. Bunbury*, 1 Beav. 318.

(*b*) L. R. 1 Ch. 320.

(*c*) 5 H. L. C. 416.

(*d*) 5 Madd. 297.

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as to Land.**

Lord Eldon in *Kennedy v. Cassilis* (*a*), under the circumstances of that case, though he expressed himself satisfied as to the jurisdiction. So in *Jones v. Geddes* (*b*), an injunction had been granted against a heritable bond creditor who was proceeding in Scotland against the assignees in bankruptcy of the obligor, who had real estate there. Lord Lyndhurst dissolved the injunction upon a simple consideration of the balance of conveniences and inconveniences of the different courses of action, but here also the jurisdiction was fully recognised. And citing *Elliot v. Lord Minto* (*c*) Lord St. Leonards says, "Of course questions of Scotch law, for example, the right of Scotch estates to be exonerated out of the personal estate, must be decided according to Scotch law; and if practicable, in a complicated case, by the Courts in Scotland." In cases, however, where litigation is pending in England, and complete relief may be had here, the Court of Chancery will restrain foreign proceedings taken by a party to the suit, as a vexatious harassing of the opposite party (*d*). This was the ground of the decisions in *Harrison v. Gurney* (*e*) and *Beckford v. Kemble* (*f*). In *Harrison v. Gurney* a decree had been obtained for the execution of the trusts of a deed for the benefit of creditors, and a receiver of real estates in England and Ireland had been appointed. Some of the trustees having filed a bill in Ireland for executing the trusts of the same deed, Lord Eldon restrained them from prosecuting that suit, on the ground that it sought the same relief as might be had under the decree obtained in this country. In *Beckford v. Kemble*, after a decree in this country for an account on a bill to redeem a West Indian mortgage, Sir John Leach would not allow the mortgagee to prosecute a suit in the *forum situs* for foreclosing the same mortgage, on the ground that full relief might be obtained under

(*a*) 2 Swans. 313.

(*b*) 1 Phill. 724; *Wedderburn v. Wedderburn*, 4 My. & Cr. 585.

(*c*) 6 Madd. 16.

(*d*) *Per* Lord Cranworth, 5 H. L. C. 437.

(*e*) 2 J & W. 563.

(*f*) 1 Sim. & S. 7.

the decree in this country. The point arose more recently in *Baillie v. Baillie* (*a*), but though an injunction was granted in that case, Malins, V.C., expressly said that the question there was only about the personal estate of a domiciled Englishman, and that he was not interfering with any remedy that might exist in Scotland against the real estate situated there of the testator.

A distinction is pointed out by Mr. Westlake (Priv. Int. Law, § 64) between cases where the equity binding on the person, and enforced by the English Court, does not exist by the law of the *situs*, and cases where it is absolutely excluded by it. Where the Court acts upon foreign lands, it does so, as explained in *Cranston v. Johnston* (*b*), through the conscience of the person whom it has the power and the duty of controlling; and it is immaterial if the special equity to be enforced has no existence in the eye of the *lex situs*, with which, as to the kind of remedy applicable to the circumstances, the English law is not likely to coincide. This is seen in the case of *Ex parte Pollard, Re Courtney* (*c*), where an equitable mortgage, according to English law, was effected by depositing the title-deeds of real estate in Scotland; and it was held that this mortgage could be enforced, although it was found in the special case that by the Scotch law no lien or mortgage was created by the deposit. The principle of this case was followed in *Ex parte Holthausen, Re Scheibler* (*d*), with respect to property situated at Shanghai, in China, though no conflict with the *lex situs* there arose, and the question was whether the contract was to be governed by English or Prussian law, having been entered into by correspondence between parties resident in London and Prussia respectively. But in *Martin v. Martin* (*e*) a post-nuptial settlement of land in Demerara invalid by the law of that colony, was held ineffectual as against a subsequent mortgagee with notice,

(*a*) L. R. 5 Eq. 175.

(*b*) 3 Ves. 170.

(*c*) Mont. & Ch. 239; see *Coote v. Jecks*, L. R. 13 Eq. 597.

(*d*) L. R. 9 Ch. 722.

(*e*) 2 Russ. & My. 507.

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as to Land.

on the ground that the law of Demerara expressly prevented the settlement from operating so as to diminish the absolute ownership and control of the husband and wife over the estate. The principle was substantially the same as that in *Ex parte Borrodaile, Re Rucker* (*a*), where an equitable mortgage, by the deposit of title-deeds, of slaves in Antigua, was declared invalid, on the ground that the laws of the colony declared void the creation of any interest in slaves—at that time real property—unless the title was made apparent by the intervention of certain forms, which in that case had been disregarded. The distinction between this case and that of *Ex parte Pollard*, just referred to, is apparent on comparing the two. And in *Waterhouse v. Stansfield* (*b*), Turner, V.C., said that when the law of a foreign country placed a restraint upon the alienation of property situated there, an equity arising here on a contract respecting such property could not be enforced against the *lex rei sitae*.

Injuries to
foreign im-
movables—
whether cog-
nizable in
English
courts.

With regard to the jurisdiction in respect of injuries to foreign realty, the question was until lately governed by the distinction between local and transitory actions, and the distinctions as to venue which have been removed by the Judicature Act (*c*), as has been already mentioned. In *Skinner v. The East India Company* (*d*), which was decided in 1665, it was solemnly laid down that no action lay in England for torts to real property or fixtures abroad, but in a subsequent case (*e*), Lord Mansfield took a distinction between actions concerning the title to or possession of foreign realty, and those for damages based on an injury to foreign realty, and referred to an action which had come before him against a captain in the English navy who had pulled down some houses in Nova Scotia, and which he had ruled was maintainable. In *Doulson v. Matthews* (*f*), however, although Lord Mans-

(*a*) 2 Mont. & Ayr. 398.

(*b*) 10 Hare, 259; see 2 Hare, 1, 8, 12.

(*c*) 38 & 39 Vict. c. 77; Ord. xxxvi. r. 1.

(*d*) Cited Cowp. 167.

(*e*) *Mostyn v. Fabrigas*, Cowp. 180.

(*f*) 4 T. R. 503.

field's *dicta* were brought before the notice of the Court, they were distinctly overruled, and it was decided again that no action lay in this country for trespass to realty situate abroad. Since the restrictions as to venue have been removed, the question has been mooted in a late case in the Probate and Admiralty Division of the High Court (*a*), where an English company, possessed of a pier in Spain, instituted a cause of damage against an English ship for negligently injuring it; but the ship having been released from arrest upon an agreement that the liabilities of the parties should be decided in the English Courts, the owners were prevented from setting up any objection to the jurisdiction. In deciding that the law of Spain must govern the case, Mellish, L.J., used the following expressions (*b*):—"If that is the rule respecting personal wrongs and respecting wrongs to personal property"—i.e., that no action can be maintained in England for a wrongful act, unless it is wrongful by the law of the country where it was committed, as well as by English law—"it seems to me *à fortiori* that it must be the rule as to wrongful acts to real or immovable property in a foreign country. Whether the rule as to wrongful acts to immovable property in a foreign country does not go still further, and prevent an action from being brought at all, is a question which it is not necessary to determine in this case; because, having regard to the consent of the parties and the agreement that has been come to, no objection to the jurisdiction could be taken." And James, L.J., said in the same case, that had it not been for this agreement, very grave difficulties indeed might have arisen as to the jurisdiction of the Court to entertain any action or proceedings whatever with respect to injuries done to foreign soil. It would indeed seem clear, that a mere alteration in the rules of procedure in the English Courts could not operate to extend their jurisdiction beyond the limits which were formerly laid down, if those limits were originally defined

(*a*) *The M. Maxham*, L. R. 1 P. D. 107. (*b*) L. R. 1 P. D. p. 112.

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not only by the necessities of procedure, but by the principles of the law of nations which English law recognises. Whether, however, the law of nations did thus define them appears very doubtful, when the unlimited jurisdiction in the case of personal torts, to which the rules of venue did not apply, is considered. According to Mellish L.J., in the judgment from which quotation has just been made, it is an established principle that no action can be maintained in the Courts of England on account of a wrongful act either to a person or personal property, committed within the jurisdiction of a foreign country, unless the act is wrongful by the law of the country where it is committed, and also wrongful by the law of this country (*a*). Thus, in *Phillips v. Eyre*, where the liability of the defendant had been taken away, and his wrongdoing purged, by the law of the country where the tortious act was committed, it was held that no action could be brought in this country. This limitation, however, is not one of jurisdiction at all; but results merely from the principle that the tortious nature of an act must be measured by the law of the place where it is done, as well as by that of the *forum* where the claim for damages is made (*b*). There has been no authority but that referred to above, since the rules of *venue* have been abolished, to shew whether the law of nations excludes jurisdiction over torts to foreign land altogether. According to the last edition of Story (§ 554) it appears to be the American view that an action for personal damages, though founded on a tort to foreign immovables, is not confined to the *forum rei sitae*. Nor do the reasons given in the English cases before the abolition of venue in any instance go beyond the necessities of English procedure. In the language already cited from the judgment of Willes, J., in *Phillips v. Eyre* (*c*), there is plainly nothing

(*a*) *The M. Moxham*, L. R. 1 P. D. 107, 111; *Phillips v. Eyre*, L. R. 6 Q. B. 1; *The Halley*, L. R. 2 P. C. 193; *General Steam Navigation Co. v. Guillou*, 11 M. & W. 877, 895; *Mostyn v. Fabrigas*, 1 Sim. L. C. 658; *Scott v. Seymour*, 1 H. & C. 219; 31 L. J. Ex. 457; *Bullock v. Caird*, L. R. 10 Q. B. 276, and *infra*.

(*b*) *Vid. infra*, Chap. IX. (ii.)

(*c*) L. R. 6 Q. B. 1, 28; *ante*, p. 129.

which necessarily means more than that actions for torts to foreign realty cannot be tried, because the rules of venue prevent them from coming before the Court. In *Mostyn v. Fabrigas* (a) Lord Mansfield pointed out that there is a formal and a substantial distinction as to the locality of trials. The substantial distinction is, where the effect of the judgment cannot be had, if the action is laid in the wrong place. The formal distinction is that which arises from the mode of trial, and excludes certain actions by means of the rules of venue. And by way of example, it was said, that there might be a solid distinction of locality, if an action were brought relative to an estate in a foreign country, where the question was a matter of title only, *and not of damages*. It can hardly be doubted that the rule as to venue was in Lord Mansfield's mind the only obstacle to the trial by an English Court of an action for injury to foreign realty (b). Nor is it easy to maintain that there is any reason more valid to restrain the jurisdiction now that that obstacle is removed. The execution of the judgment in such an action, inasmuch as it can only be brought when proper service is effected on the defendant, and execution can only issue on his person or property within the jurisdiction, cannot interfere with the sovereign rights of a foreign Power, as it would in an action for the title to or possession of land. An injury to land is in fact a personal injury to its owner, and is no more beyond the jurisdiction of an English Court, on general principles, than other personal injuries are (c).

(a) Cowp. 161; 1 Sm. L. C. 658, 680.

(b) See however *Doulson v. Matthews*, 4 T. R. 503.

(c) See *The M. Moxham*, L. R. 1 P. D. 107, and *infra*, Chap. IX. (ii.)

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PROPERTY.****CAP. VI.****SUMMARY.****JURISDICTION AS TO REAL PROPERTY (INCLUDING CHAT-
TELS REAL) SITUATE ABROAD.**

p. 121. The jurisdiction over real or immovable property, abstracted from the acts and contracts of the persons who deal with it, belongs to the *forum situs* alone, which will administer the *lex situs* in exercising it.

And this general principle will prevent an action from being maintained in England for the possession of or property in foreign land, independently of any rule of procedure, such as those which formerly prevailed with respect to venue.

pp. 122-131. But where a personal equity, resulting either from a trust or a contract over which an English Court has jurisdiction attaches to an individual who is before the English Court or can be brought before it, the English Court will indirectly affect foreign land by acting *in personam*, i.e., upon the conscience of its own justiciable.

Thus, by the enforcement of such an equity, the title to the property in or the right to the possession of foreign land may be indirectly transferred.

p. 130. The mere fact that a contract relates to foreign land, or to the rights that are incident to its possession, will not exclude the jurisdiction of the English Court, if the contract is one with which it is otherwise competent to deal; at any rate, unless it is shewn that the Courts of the *situs* have already and properly assumed jurisdiction over the claim.

pp. 131, 132. Where such an equity as that defined exists, the English Court will at its discretion restrain by injunction proceedings abroad with respect to the foreign land to which it relates.

p. 133. But it seems that where the equity is absolutely repugnant to the *lex situs*, the English Court will not enforce it, though it would have done so had the equity in question been merely non-existent by that law.

There is no direct authority to shew that the jurisdiction over torts to foreign land, which the English Courts were formerly prevented from assuming by the rules relating to venue, is extended by the abolition of those rules; but an action founded on such a tort, being for personal damages only, might on general principles be maintained here.

(ii.) *Nature and Incidents of Immovable Property and Realty.*

It has been already said that a general consent exists as to the principle that real or immovable property is subject exclusively to the law of the government within whose territory it is situate. The authorities cited by Story for this general proposition are very numerous (*a*), but it will be more advantageous to consider what are the directions in which this *lex situs* is allowed exclusive operation, and how far it extends. It must be sufficiently apparent from the last section that there are many cases in which the exclusive action claimed for it is interfered with.

(*a.*) *Nature of Realty.*—The *lex situs*, in the first place, must decide what things and appurtenances are so closely connected with the soil as to partake of the nature of realty, though not themselves *land* in anything but a legal sense. Of these some are so universally regarded in this light, as easements and rent-charges, for example, that no special mention need be made of them; but with regard to other things whose character is more doubtful, it is laid down by Story (*b*) that the question is not so much what are, or ought to be deemed *ex suâ naturâ*, movables, as what are deemed so by the law of the place where they are situated; and that to ascertain what is immovable property and what is not, recourse must be had in all cases to the *lex rei sitæ*. The English case cited by Mr. Westlake (Priv. Int. Law, § 75) for the same principle (*c*) scarcely seems to bear out the proposition to its full

Lex situs
decides what
are immov-
ables.

(*a*) Story, Conflict of Laws, § 428.

(*b*) Conflict of Laws, § 447.

(*c*) *Ex parte Rucker*, 3 D. & Ch. 704; see *Smith v. Brown*, 2 Salk. 666.

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Distinction
between move-
ables and per-
sonal estate.

extent, since the decision of Erskine, C.J., turned chiefly upon 5 Geo. 2, c. 7, s. 4, which spoke of negroes as real estate, and not so much upon the fact that they were so by the law of Antigua, where they were situated. It may, however, be taken generally that the decision of the *lex situs* is universally accepted on such questions. In *Chatfield v. Berchtoldt* (a) the question was whether a rent-charge *pur autre vie* issuing out of English land was liable to legacy duty as personal estate under the English statutes (14 Geo. 2, c. 20, s. 9; 1 Vict. c. 26), which make estates *pur autre vie* applicable as personal estate in the hands of executors and administrators, and it was held on appeal that legacy duty was payable on such rent-charge. The domicil of the testatrix being Hungarian, it was contended in opposition to the Crown that the character of personal property was so impressed by the several statutes upon the interest in question, as to make it for all intents and purposes personal property, attached to the domicil and person of the testatrix, and therefore exempt from legacy duty according to the principle of *Thomson v. Advocate-General* (b). It was held, however, that the English law only made it personal property for the purpose of charging it with legacy duty, and that except in this limited respect, it remained realty. In the words of the judgment, it lay upon the respondent to shew that by the law of England estates *pur autre vie* in land had been converted into pure personality or movables, and he did not discharge this burden by shewing that by some statutory provisions in some cases they are to be applied in the same manner as personal estate. But it was taken for granted throughout that the English law was the proper test by which to decide the real or personal nature of the interest in question. Almost the same point arose in *Freke v. Lord Carbery* (c), where it was held that the validity of a testamentary disposition of an English leasehold was

(a) L. R. 7 Eq. 192; see also *Stewart v. Garnett*, 3 Sim. 398.

(b) 12 Cl. & F. 1; *Wallace v. Attorney-General*, L. R. 1 Ch. 1.

(c) L. R. 16 Eq. 461.

governed by the law of England, and not by that of the testator's domicil. In that case a testator domiciled in Ireland (to which the Thellusson Act does not extend) devised an English leasehold to trustees upon trust to sell and hold the proceeds upon certain trusts for accumulation invalid by the Thellusson Act ; and it was held that these trusts were invalid so far as regarded the English leasehold, though valid as to the personal estate, which was to be regulated by the law of his domicil. It was contended that the English law regarded leasehold property as personal estate, and therefore remitted all questions concerning it to the decision of the law of the testator's domicil ; but Lord Selborne pointed out that this principle, expressed in the Roman maxim *mobilia sequuntur personam*, referred to *movable* property only, as distinguished from immovable ; and that although for some purposes the English law regarded leaseholds as chattels, yet land, whether held for a chattel interest or held for a freehold interest, is, as a matter of fact, immovable and not movable. Lord Selborne further cited with approval the *dicta* of Story on this point, which have just been referred to, and there is now no doubt that it expresses the English law on the subject. The main difficulty in the matter arises from the loose employment of the terms "personal" and "movable" as synonymous. That they were so originally is of course evident from the maxim itself. *Mobilia sequuntur personam* may be freely translated "moveables are personal property," but the use of English law has attached a special and definite meaning to the term "personal estate," which differs materially from that more commonly given to it in international jurisprudence. This special meaning is pointed out by Jarman (on Wills, vol. i., p. 4 n.), who says, "The distinction between real and personal estate is peculiar to our own policy, and is not known to any foreign system of jurisprudence that is founded on the civil law, in which the only recognised distinction was between movable and immovable property. Leaseholds for years, therefore, which obviously belong to the latter denomination, though

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they are with us transmissible as personal estate, are governed by the *lex loci*, and do not follow the person; so that if an Englishman domiciled abroad dies possessed of such property, it will devolve according to the English law." Mr. Jarman's subsequent editors appear to have dissented from this proposition, citing 11 Jarm. Byth. Conv. 3rd ed. p. 15, Deane on Wills, p. 15, *Price v. Dewhurst*, 4 My. & Cr. 81, *Jerningham v. Herbert*, 4 Russ. 388, and *Pearmain v. Twiss*, 2 Giff. 136, as authorities for the ambiguously worded proposition that the *lex loci* must determine what part of the estate is real and what personal, and that then the *lex domicilii* comes in and determines the distribution of that part of the property which the *lex loci* has declared to be personal. All these authorities, however, plainly employ the word "personal" in the very sense against which Mr. Jarman's caution is meant to guard, and the point may be at any rate now regarded as finally settled by Lord Selborne's judgment, just referred to, in the case of *Freke v. Lord Carbery* (a).

Incidents of
immovables—
limitation and
prescription.

The nature of realty being thus undoubtedly a question which the *lex situs* must decide, it may be added that almost all the incidents which arise in connection with it are to be referred to the same law (b). The rules of limitation and prescription, as applied to real property, come under this head, and may be mentioned here. Both are governed by the *lex situs*, for the simple reason that the *situs* is necessarily the *forum*. A statutory limitation absolutely extinguishes a right of action, irrespective of its merits, and, in relation to land, has the indirect effect of creating a good title, by providing the possessor with a valid defence to any action which may be brought to interfere with his possession. It is thus plainly something pertaining to the remedy, and being a question of procedure must in principle, as will be shewn again hereafter, be governed entirely by the *lex fori* (c). But it has been

(a) L. R. 16 Eq. 461.

(b) *Nelson v. Bridport*, 5 Beav. 547, 570.

(c) But as to this, see *Pitt v. Dacre*, L. R. 3 Ch. D. 295; *infra*, p. 144.

already stated that no action can be brought to interfere with the possession of realty except in the *forum* of the *situs*, so that the *lex fori* and the *lex situs* become identical. Similarly, *prescription* may be regarded as conferring a title generally to incorporeal rights in realty, directly, and not merely indirectly by providing the possessor with a defence; and the rules of prescription are thus part of the law of property, of which the *lex situs* is the source. As, however, an incorporeal right in immovables can never be effectually asserted except in the Courts of the *situs*, the *lex fori* and the *lex situs* are again identical. Cases, however, may easily be conceived where a prescription or a limitation with regard to foreign immovables may be set up in an English Court in answer to an attempt to enforce in an English Court some such personal equity as that indicated by Lord Selborne in *Harrison v. Harrison* (*a*), cited above. The question will then arise whether the *lex fori*, in matters of prescriptions and limitations which affect real estate, is the proper law to be followed for its own sake, or only so long as it coincides with the *lex situs*? It seems clear on principle that if the rule of prescription appealed to is not merely and directly extinctive of the remedy sought, but is a law which affects directly to govern right and title in the immovable property concerned, then the *lex situs* is the proper law to govern as such. As to ordinary rules of limitation, which are not creative of title, except indirectly, the same reasoning hardly applies. The most successful editor of Wheaton (Mr. Dana) says of these rules (*b*): "As these statutes are rules of repose resting on the policy of the State, it seems reasonable that any State may apply them to all suits in which the aid of its tribunals is invoked, whether the parties are citizens or aliens; whether the thing in dispute is within or without the territory of the State, and be movable or immovable, corporeal or incorporeal. It is true that a statute of limitations indirectly operates upon title to property, and has the same effect in aid of the party sued as a defensive

(*a*) L. R. 8 Ch. 342.

(*b*) Wheaton, Int. Law, § 143, n.

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prescription ; and so it may be argued that they belong to the laws of property and not of mere remedy ; but it is impossible, in international law, to be governed by these indirect operations."

In a recent case (*a*) it was, however, apparently assumed by the Court that the law which regulates the prescription of actions as to real estate is not the *lex fori* but the *lex loci rei sitae*. Funds had been paid into Court representing the rents and profits of certain lands in Jamaica, out of which an annuity had been granted by will in 1810. The last payment on account of the annuity had been in 1842, and the personal representative of the annuitant claimed to be entitled to the funds in Court to satisfy arrears of the annuity. It was held that the English statute of limitations did not apply to land in Jamaica, and that the claim of the personal representative of the annuitant was not barred by the lapse of time, although it was admitted that the *lex fori* regulated the prescription of actions which did not affect realty (*b*). Hall, V.C., said, "There is no corresponding statute of limitations applicable to the island of Jamaica ; and these annuitants are, in my judgment, as much entitled to recover their annuities as the estate itself, as they are only portions of the estate." No further notice of the conflict between the *lex fori* and the *lex situs* appears to have been taken. As to the question of the applicability of the *lex fori* to cases of prescription in personal actions, it will be discussed hereafter when treating of procedure ; but it may here be mentioned that Westlake regards the conflict as still open for decision, while Story considers it conclusively settled in favour of the *lex fori* (*c*). The question of the applicability of local laws of prescription and limitation to real or immovable property appears to arise most naturally in this form. It is conceded that a valid *title* to land can only be conferred or taken away by the *lex rei sitae* (*d*). It is equally indisputable that the

(*a*) *Pitt v. Lord Dacre*, L. R. 3 Ch. D. 295.

(*b*) Citing *Ruckmaloje v. Mottichund*, 8 Moo. P. C. 4.

(*c*) Westlake, § 252 ; Story, §§ 576-581.

(*d*) *Ante*, p. 121.

Prescription
as to foreign
land—how far
governed by
the *lex situs*.

manner and time of bringing an action, apart from any question of title to land, are regulated like other matters of procedure, by the *lex fori* (*a*). The title to land can of course be only directly litigated in the *forum situs*, but in administering and enforcing personal equities, it may often happen that it becomes necessary to inquire into the title to foreign land in an English Court (*b*). The question which will then arise is, whether the local law of prescription or limitation has either conferred or taken away any title to the foreign land, or whether it has merely enacted a rule to regulate the procedure of its own Courts, which will not be binding upon those of another country? In the large majority of cases, such laws do purport either to create a title positively, or negatively to take a title away by preventing its assertion. When the title is positively created by a law of prescription, it is tolerably clear that a foreign Court cannot be justified in ignoring it, though its own laws of prescription would not have conferred it under the same circumstances. The matter is not quite so clear when the local law of limitation merely enacts that, after a certain lapse of time, no action to assert title shall be brought. A law which prohibits the assertion of title does, however, practically take it away, and vest it in some one else. No person can be said to have a valid title to land by the *lex rei sitae* which that law does not permit him to assert in its own courts. When a law takes away a remedy altogether, it virtually destroys the right to which such remedy is attached. To abolish a remedy is not to regulate it; and the right to regulate the remedy is all that the *lex fori* can reasonably claim. There may conceivably be cases where a law of limitation is so framed as to apply, and to be intended to apply, to procedure alone; but in the majority of instances this will not be so; and subject to this exception, it is submitted that the provisions of the *lex rei sitae* as to the period of limitation applicable to immovables should be universally followed.

With regard to the liability of foreign immovables to

(*a*) *Infrà*, Chap. X. (ii.)

(*b*) *Ante*, p. 121, *sq.*

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Liability of
foreign land
to debts of
owner.

the debts of the owner, the *lex situs*, apart from any consideration of an equity affecting him, is alone entitled to be heard. In *Harrison v. Harrison* (a), on appeal from the Master of the Rolls, where a Scotch heir had elected to take Scotch lands by descent in opposition to an English will, the domicil of the testator being English, and the will itself being ineffectual to pass real estate in Scotland, it was decided that the liability of the Scotch real estate to the payment of debts, as between the heir and the pecuniary legatees, must be determined by the law of Scotland, and not by the law of the country where the estate was being administered. In that case Lord Selborne said, "The doctrine of marshalling, as applied in favour of legatees against heirs-at-law taking descended real estates in England, is part of the *lex loci* of England affecting those real estates, and no question of conflict of law can arise under those circumstances. It is a wholly different thing when persons, who have an interest in the personal estate only, endeavour indirectly to establish in their own favour, or for their own relief, a burthen upon real estate situate in another country, which, by the law of that country, would not be administered so as to give them what they ask. . . . It is admitted, as I understand, that the burthen of liability to debt, so far as relates to real estate, can only be created by the *lex loci rei sitae*; but it is suggested that the burthen may be laid on real estate, on which it is not imposed by the *lex loci rei sitae*, by an indirect equity in favour of the legatees. . . . What is that equity? There is no fiduciary relation. What right have these legatees, upon the footing of personal equity, to say that the heir shall not enjoy the Scotch real estate as the law of Scotland gives it to him, or that any burthen shall directly or indirectly be thrown upon that real estate in their favour, which would not be imposed by the law of Scotland?" (b) Similarly it was

(a) *Harrison v. Harrison*, L. R. 8 Ch. 342; *Drummond v. Drummond*, 6 Bro. P. C. 601; *Elliott v. Minto*, 6 Madd. 16; *Carron Iron Co. v. Mac-laren*, 5 H. L. C. 416.

(b) L. R. 8 Ch. 348.

decided in an old case that the question of a creditor's lien on real estate was to be determined by the *lex situs* (a). It may be added that a heritable Scotch bond in the possession of an English testator is real estate, and descends to his heir-at-law (b), being regarded as an integral part of the Scotch land which is bound by it to satisfy the debt. Nor does the fact that a personal obligation is inserted in such bonds alter their nature, the personal security being regarded as a mere adjunct to the heritable security (c). The case is different where the heritable bond is not an asset in the possession of the testator or intestate, but a bond given by him to some one else, and remaining after his death as a debt due from his estate, as well as a charge upon the Scotch land on which it was given. Thus in *Maxwell v. Maxwell* (d), where an English testator charged his personal residuary estate with payment of "all his just debts," and after the date of his will borrowed £14,000 on Scotch lands, for which he gave a heritable bond, it was held that the expression "all my just debts" in the will, interpreted by the *lex domicilii* of the testator, included the charge on the Scotch land, and that the residuary personal estate was liable to payment of the £14,000 in exoneration of the Scotch realty. The Scotch heir, who took by intestacy (the will not affecting Scotch lands) was therefore not put to his election. It will be seen that this case, though from one point of view the converse of *Jerningham v. Herbert* (e), depends in substance upon totally different principles. That case shews that a heritable bond in the possession of the testator, a charge on somebody else's Scotch land, is in reality regarded as a portion of that land, and is not included in a bequest of the testator's personal estate like other choses in action, although the debt which it secures is also due on a

(a) *Scott v. Nesbitt*, 14 Ves. 438.

(b) *Johnston v. Baker*, 4 Madd. 474, n.; *Buckleuch v. Hoare*, 4 Madd. 467; *Allen v. Anderson*, 5 Hare, 163.

(c) *Jerningham v. Herbert*, 4 Russ. 388.

(d) L. R. 4 H. L. 501; S.C. *sub voc.* *Maxwell v. Hyslop*, L. R. 4 Eq. 407.

(e) 4 Russ. 388.

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Scotch heritable bond—
effect of
collateral security.

personal bond. *Maxwell v. Maxwell*, on the contrary, decided that where the testator had given such a heritable bond, charging his Scotch land, the debt secured by it was within the meaning of the phrase "all my just debts," as used in his will. The first case was decided on the ground that the *lex situs* must decide what is realty and what is not, and what is sufficient to pass it; the second on the ground that the *lex domicili* must be called in to interpret a testator's intention.

It has just been said that the fact of a personal obligation being inserted in a Scotch heritable bond does not alter its nature, but that it descends notwithstanding to the heir-at-law. But if the personal obligation be contained in a separate instrument, so that the debt due to the testator was secured both by a Scotch heritable bond charging it on his debtor's land, and a personal security given by the debtor, the personal security may be disposed of by a will in the form of the domicil, and the heir will thus lose the benefit of the Scotch heritable bond, as the debt secured by it may be paid to the executor or legatee under the will. This has been held not only where the personal bonds were specifically devised by the will (a), but also where the testator had devised generally to his executors "all his moneys, securities for money, chattels, and other personal estate" (b). The principles on which these decisions should be distinguished from those cases in which it has been held that a Scotch heritable bond is realty to which the Scotch heir is entitled, may perhaps be best stated in this way. Where a heritable bond alone is taken by the testator on lending his money, he is regarded as having in effect laid out that money in the purchase of Scotch land. But where he takes a personal bond as well, the debt due to him is regarded as still a chose in action, which still, therefore, forms part of his personal estate.

The judgment in *Cust v. Goring*, delivered by Lord

(a) *Buccleuch v. Hoare*, 4 Madd. 467.
(b) *Cust v. Goring*, 18 Beav. 383.

Romilly, forms a convenient summary of the previous cases on the subject, and may be quoted with advantage.

" This is a case in which the determination of which system of law is to prevail depends less upon principle than upon authority. In order, therefore, to determine whether the Scotch or English law shall prevail in this case, it is necessary to consider the authorities affecting cases of this description, which I will do in their order. The first I think necessary to mention is *Brodie v. Barry*, 2 Ves. & B. 36. It is very distinguishable from this case. There the testator had by his will purported to dispose of his Scotch real estate, but the will not being in conformity with the solemnities required by the Scotch law, was inoperative for this purpose. The question then was whether this raised a question of election against the Scotch heir, who was a legatee under the will. Sir W. Grant held that this was analogous to the case of a will purporting to dispose of copyholds not surrendered to the use of the will, and that therefore, as the will, in the case of copyholds, could be read against the customary heir, so also, in that case, the will could be read against the heir of the Scotch estates: the effect of which was, that he was put to his election. No contest arose between English and Scotch securities for the same debt. There was in that case no question but that the will did not affect the debt, or any instrument affecting to secure it.

" The next case is that of *Johnstone v. Baker*, 4 Madd. 474, n. That also was a case where the heritable bond was the only security given, which bond did not pass by the will of the testator, and which is, therefore, distinguishable from the present case.

" The *Duchess of Buccleuch v. Hoare* (4 Madd. 467), before Sir John Leach, did raise a question between English and Scotch instruments given to secure the same debt. In that case the testator had advanced sums of money to the Duke of Buccleuch and the Duke of Montague, on two several occasions, which sums were secured by two Scotch heritable bonds and by two ordinary English money bonds.

Cust v. Gor-
ing.

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The testator, by his will, reciting that he was possessed of two bonds or obligations, of the Dukes of Buccleuch and Montague, bequeathed them to his executors, upon certain trusts specified in the will. The Court held that the will passed the debt, and that the heir was a trustee for the legatee.

"In *Jerningham v. Herbert* (4 Russ. 388), before Sir John Leach, no contest arose between English and Scotch securities. That was the case of a Scotch heritable bond given to secure a debt, which, although it also contained a personal obligation to pay the debt, as a part of the same instrument, was held not to pass by a will which affected English property only. It does not therefore, as it appears to me, govern this question.

"*Allen v. Anderson* (5 Hare, 163), before Sir James Wigram, was the case of a testator who at the time of making his will was a creditor for a large sum of money, apparently not secured by any instrument whatever. Subsequently to the date of his will, a Scotch heritable bond was given to secure this debt, which bond was not affected by the will. The Court held, that the heir was not a trustee for the legatees under the will, and that he was not put to his election. That case also is very distinguishable from the present. It seems to me to have been analogous to the simple case of a testator laying out money in the purchase of land subsequently to the date of his will. The testator took a heritable bond as a security for the debt, which heritable bond did not pass by the will. If he had taken real estates in England, in exchange for the debt, it would not have passed by the will, and would in that case have been in all respects analogous to the case which actually occurred; and in the case last supposed, it is obvious that, according to the principle of English law, the heir could not have been put to his election.

"In *Drummond v. Drummond* (Roberts. on Personal Security, p. 209), before the House of Lords, and commented upon by Sir W. Grant in *Brodie v. Barry*, there was no contest between securities. The contest was,

whether the English personal estates or the Scotch real estates, should be applied to discharge a heritable bond granted by the testator on his Scotch estates; and it was there held, that the Scotch law was to govern the question, inasmuch as the rights of a person to real property must depend upon the law of the country where it was situated; and consequently, that the person who took the Scotch real estate must take it with the burthen upon it, that estate being by the Scotch law the primary fund for the payment of the bond The only distinction between *Buccleuch v. Hoare* and the present case rests on this, that there the testator had, by his will, specifically bequeathed the English securities for the debt. In this case the testator has not specified the securities, but he has disposed of his personal property in general terms. The description, however, of the property bequeathed, contains the words "securities for money" which obviously includes the bond in question. But I think that this specific mention is not essential to the case. The English bond was the primary security for the debt; it was never cancelled; and it was not merged in or extinguished by the Scotch bond, which was given as an additional security" (a).

SUMMARY.

(ii.) NATURE AND INCIDENTS OF REAL OR IMMOVABLE PROPERTY.

The *lex rei sitæ* is entitled to determine what is, and p. 139. what is not, real or immovable property.

The *lex rei sitæ* may accordingly impress the character of personality upon the *res sita* for its own purposes (as for the payment of legacy duty), without abandoning its pp. 140, 141. claim to regard the same *res sita* as realty or immovable property for the purposes of international law. The *lex rei sitæ*, in calling the *res sita* personality, does not thereby

(a) *Oust v. Goring*, 18 Beav. 383.

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pp. 142-145.

convert it into movable personality. Movables and personality are not equivalent terms.

The *lex rei situs* will generally prevail as to questions of limitation and prescription in their application to real or immovable property, inasmuch as these naturally arise only in the *forum rei situs*. There is some authority for saying that the *lex rei situs* will also prevail when such questions arise in a foreign court; but among jurists there is some conflict of opinion on the point, the *lex fori* asserting its claim to deal with the matter as pertaining to the remedy.

The *lex rei situs* will determine the liability of real or immovable property for the debts of its deceased owner, testate or intestate, and the obligation of the heir in respect of those debts. But this principle may be modified, (i.) by the rule that the construction of a will depends upon the law of the domicil of the deceased; (ii.) by a personal equity affecting the heir.

(iii.) *Transfer of Immovable Property inter vivos.*

Capacity for transfer.

It is firmly established, that both as regards the capacity of transferring, and the necessary forms to effect the transfer, of land, the *lex situs* is alone competent to speak (a). As regards the question of capacity, there is a dearth of English decisions, and Mr. Westlake (Priv. Int. Law, § 89) shews an inclination to refer it, even with respect to the transfer of realty, to the *lex domicilii* of the person, rather than to the *lex situs*. It has, however, been already pointed out (p. 31) that the English law regards the law of the place where an act is done, or a contract entered into, as the proper one to decide all questions of minority or majority, capacity or incapacity (b). And it can hardly be supposed that the fact of an Englishman being domiciled in Prussia, where majority is not attained until the age of twenty-five, would be sufficient to invalidate a conveyance by him of English land made

(a) Story, Conflict of Laws, 430, 436 a; see the cases cited, *ib.* 428, n. 3.

(b) Story, Conflict of Laws, 103.

when he was twenty-four. This is, however, a proposition for which numerous jurists, who advocate the claims of the domiciliary law, are prepared to contend (*a*) ; but the language of Abbott, C.J., in *Birtwhistle v. Vardill* (*b*), may be quoted to shew how untenable it must be considered. "The rule as to the law of the domicil has never been extended to real property . . . Is there any authority that the law of England, as to any lands in England, is to adopt the law of a foreign country?" (*c*)

As to the formalities required to make a valid transfer, *Formalities of transfer.* there is a greater abundance of decisions. Transfer *inter vivos* of real estate, by English law, must be governed, as to the formalities which accompany it, by the *lex rei sitae* alone (*d*). In *Robinson v. Bland* (*e*) Lord Mansfield said : "In every disposition or contract where the subject-matter relates locally to England, the law of England must govern, and must have been intended to govern. Thus . . . as to conveyances or wills of land, the local nature of the thing requires them to be carried into execution according to the law here." *Waterhouse v. Stansfield* (*f*) was a case where the effect of the law in Demerara was considered as to land there situate, purporting to restrain the alienation by a debtor of any immovable property without the assent of his debtors, express or implied, and without certain prescribed forms, intended to secure this object ; and it was held that such a law must prevail to exclude the claim of an English assignee of the equitable interest in such land. Turner, V.O., said : "When the law of a foreign country places a restraint upon the alienation of the property of a debtor situate in such country, an equity arising here on a contract entered into in respect of such property cannot be enforced against the *lex loci rei sitae*."

The restraint spoken of in the case last cited was, as *Restraints on transfer.*

(*a*) See Story, Conflict of Laws, 432 sq., 51 sq.

(*b*) 5 B. & C. 451.

(*c*) As to the recent alteration in the law regarding the capacity of aliens, see 33 & 34 Vict. c. 14, *ante*, p. 3.

(*d*) 2 Dwarris on Stat. 648; *Warrender v. Warrender*, 9 Bligh. 127.

(*e*) 2 Burr. 1079.

(*f*) 10 Hare, 254.

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has been said, only conditional, depending upon the neglect or employment of the forms prescribed by the *lex situs*. It is to be observed, however, that all restraints imposed by that law, which determines generally the effect and operation of any attempt at the transfer of realty, are to be accepted as binding; and that such restraints only bind within the territorial limits of the authority which imposed them. Thus the English Statute of Mortmain does not apply to land within the colonies, which was decided in *Whicker v. Hume* (*a*), upon the authority of Sir W. Grant in *Attorney-General v. Stewart* (*b*), though the case turned more upon the intention of the legislature, and the policy of the law of mortmain generally, than upon the strictness of the theory of the intra-territorial operation of all laws regulating the disposition of immovables. Nor do they apply to land in Scotland; but where a will was made in England and according to English form by a domiciled Scotchman, bequeathing money to trustees to *purchase lands* (without saying where), and pay over the rents for charitable purposes to persons resident in Scotland, the bequest was held void under the Statute of Mortmain, there being nothing in the words to shew that a purchase of anything but English lands was contemplated (*c*).

In *Renaud v. Tourangeau* (*d*) the effect of an attempt at restriction of all alienation for twenty years, by a Canadian testator, was discussed with reference to Canadian land; and though it was suggested in argument, by way of analogy, that such a restriction would be bad by English law, even if there had been a gift over, it was assumed throughout that the real question was, whether such a restraint on the alienation of Canadian land was bad or good by the law of Canada. It is true that Lord Romilly said in his judgment that it would be invalid, not only by the old French law, prevailing in Lower Canada,

(*a*) 7 H. L. C. 124.

(*b*) 2 Meriv. 143.

(*c*) *Attorney-General v. Mill*, 3 Russ. 328; *Curtis v. Hutton*, 14 Ves. 537.

(*d*) L. R. 2 P. C. 4.

but by the general principles of jurisprudence; but it is plain that all that was meant by this latter expression was to signify those rules of public policy which must be taken as part of the common law in every part of the British Empire.

SUMMARY.

(iii.) TRANSFER OF IMMOVABLE PROPERTY INTER VIVOS.

The *lex situs* determines all questions relating to the transfer of real estate.

Thus (*inter alia*), it determines the capacity of the parties to the transfer.

[There is, however, little *direct* authority on this point, and jurists shew a tendency to decide capacity on this, as on all other matters, by the *lex domicilii*.]

The formalities of the transfer, and the restrictions on the freedom of alienation, are similarly decided by the same law.

(iv.) Succession to Immovable Property by Will.

It is hardly necessary to state that the principle that conveyances *inter vivos* of realty must comply with the formalities required by the *lex situs*, applies *à fortiori* to all alienations of real property by will (a). But a will, though executed so as not to pass real estate, may be read for the purpose of discovering in it an implied condition respecting real estate, annexed to a gift of personal property, and thus in *Brodie v. Barry* (b), a Scotch heir-at-law, who was entitled to personal property under a will made in English form, was put to his election. Exactly the reverse case occurred in *Dundas v. Dundas* (c), where the heir-at-law of real estate in England, which the testator had attempted to devise by a will in Scotch form, im-

(a) *Coppin v. Coppin*, 2 P. Wms. 291; *Curtis v. Hutton*, 14 Ves. 537; *Bovey v. Smith*, 1 Vern. 85; *Drummond v. Drummond*, 3 Bro. P. C. Toml. 601.

(b) 2 Ves. & B. 127.

(c) 2 Dow & Cl. 849.

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Equities
affecting heir
or devisee. .

Foreign heir
—when put
to his election.

perfect to carry out the intention, was put to his probate or reprobate of the will as it stood. Where the heir-at-law, in such a case, elects to take by inheritance in opposition to the will, it has been already shewn that no personal equity attaches to him, by which the foreign realty can be affected by the law of the English Court as to marshalling in favour of legatees (*a*), the mere fact that he is before the Court as a party to the suit not warranting any interference, as to the foreign real estate, with the *lex loci rei sitae*. Such an equity results, however, from the expressed intention of the testator, according to the interpretation of his will by the domiciliary law (*b*), and therefore though the English will of a domiciled Englishman may not be available to devise Scotch land, yet the heir to whom it would go on intestacy cannot share in other benefits under the will, if he defeat the intention of the testator as to the land by taking advantage of the invalidity of the will to pass it to the devisee. In such a case, therefore, he is put to his election; but the intention of the testator to pass the foreign land by his will must clearly appear, and it has been held that *general expressions* will not, as a rule, be sufficient to shew that intention (*c*). General words of description will be intended to apply to such property only as would by its nature pass by the will, and to the uses therein expressed (*d*). Or, as Lord Cranworth expressed it in a more modern case (*e*), the designation of the subject intended to be affected by the instrument in general words imports *prima facie* that property only upon which the instrument is capable of operating. To affect foreign land indirectly by a will not executed according to the *lex situs*, by putting the heir to his election, the foreign property must be either specifically devised, as in *Brodie v. Barry* (*f*), or there must be

(*a*) *Harrison v. Harrison*, L. R. 8 Ch. 342.

(*b*) *Maxwell v. Maxwell*, L. R. 4 H. L. 501.

(*c*) *Johnson v. Telfourd*, 1 Russ. & My. 254; *Allen v. Anderson*, 5 Hare, 163.

(*d*) *Per Sir J. Leach in Johnson v. Telfourd*.

(*e*) *Maxwell v. Maxwell*, 2 De G. M. & G. 705.

(*f*) 2 Ves. & B. 131.

at any rate words from which the intention to act on it can be unequivocally gathered. These principles have been fully recognised in the later cases, an heir of foreign immovables being put to his election by a will not in itself operating upon them, only where there was a personal equity affecting him with reference to them, arising from the expressed intention of the testator or in any other manner. Thus, in *Dewar v. Maitland* (*a*), a will devised lands in England to the testator's son and heir for life, remainder to trustees, and also lands in St. Kitts to the same trustees upon trust to sell and invest the proceeds in lands in England, to hold on the same trusts. The will was executed according to the English law only, and did not operate so as to pass the land in St. Kitts, but the heir-at-law having received the rents of the St. Kitt's estates during his life, his infant heir was held bound by such election after his death, so as to be debarred from setting up his title as heir of the lands in question against the title of the trustees, who had contracted to sell the property to a stranger. So in *Orrell v. Orrell* (*b*), where a testator devised "all the residue of my real estate situate in any part of the United Kingdom or elsewhere," having real estate in Scotland as well as England, the heir-at-law taking the Scotch lands was put to his election, it being held that the testator had sufficiently indicated his intention to dispose of his real estate in Scotland as far as he was able to do so; notwithstanding the general rule that, without clear evidence of intention, a testator will be supposed only to be dealing with what he can dispose of by the instrument whose construction is in question. Except, however, so far as it is affected by such a personal equity as that involved in the doctrine of election, a will of foreign realty must comply strictly with the *lex loci rei sitae*, and with that law alone; and it was decided long ago (*c*) that the English Court of Chancery would not direct an issue to try the validity of a will of lands in

(*a*) L. R. 2 Eq. 834.(*b*) L. R. 6 Ch. 302.(*c*) *Pike v. Hoare*, 2 Ed. 182.

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one of the colonies, which have distinct local laws of their own. And it has been decided that the provisions of 20 & 21 Vict. c. 77, which authorize the citing of the heir-at-law or persons interested in the real estate, when contentious proceedings arise as to the validity of a will, and by which the probate of a will granted after such litigation is to enure to the benefit of all persons interested in the real estate affected by the will, are not applicable to wills which in whole or in part have not been executed in accordance with the Wills Act (1 Vict. c. 26) (a). These statutory provisions cannot be employed, therefore, when the testator was not domiciled in England, and his will was executed so as only to satisfy the requirements of the law of his domicil, in order to bind indirectly immovable property in England by a will not executed in accordance with the *lex situs*. The construction, however, of wills is in all cases a matter for the law of the domicil alone, even when the destination of immovables situate in some country other than that of the domicil is affected by it (b).

SUMMARY.**(iv.) SUCCESSION TO IMMOVABLE PROPERTY BY WILL.**

p. 155.

The *lex situs* decides the capacity of the testator to devise immovable estate (see, however, the qualification of the rule just stated as to the capacity to transfer *inter vivos*), the formalities of the testamentary instrument, and its operation upon the land which it affects to devise.

pp. 155, 156.

But where a testator intends and attempts to devise immovable estate by a will not effectual to do so by the *lex situs*, the heir of the immovable estate will not be permitted to take a bequest of movable personal estate under the will, and to defeat the same will as to the land. In

(a) *Campbell v. Lucy*, L. R. 2 P. & D. 209.(b) *Trotter v. Trotter*, 4 Bligh, N. S. 502; S.C. 3 Wilts. & S. 407; *Enohin v. Wylie*, 10 H. L. C. 1.

such a case, he will be put to his election whether he will accept the will for all purposes or for none.

The liability of his foreign immovable estate to the personal debts of the testator depends upon the *lex situs* p. 156. alone, where no intention on the part of the testator to interfere with that law appears; and the law of his domicil cannot impose any burden upon such foreign immovable estate from which by its own law it is exempt.

The intention of the testator to devise or burden foreign land by a will insufficient by the *lex situs* to do so, must, p. 156. in order to impose a personal equity on the heir, be unequivocally expressed. General words, which might be satisfied by a different interpretation, will not be construed as evidence of such an intention.

The construction of wills, even when foreign land may p. 158. be indirectly affected by it, is for the law of the testator's domicil alone.

Hitherto the transfer of immovable property in accordance with the wish of its owner, expressed either in a conveyance *inter vivos*, or by a testamentary disposition, has been spoken of. Land, however, changes owners under certain circumstances without any expressed intention on the part of the owner, by the mere operation of law. It will be necessary to consider what law operates, and how far it excludes all others, in the alienation of land either (v.) by succession on intestacy, or (vi.) by assignment on bankruptcy, or (vii.) by operation of marriage.

(v.) *Succession to Immovable Property on Intestacy.*—It Inheritance of has already been stated, in treating of the question of immovables. legitimacy, that the English law requires an heir to English land to be legitimate by the law of the *situs* as well as by that of his domicil (a). Not only is this question to be decided by the former law, but the destination of the property is determined in all other respects by it (b).

(a) *Doe d. Birtwhistle v. Vardill*, 7 Cl. & F. 895; and see *supra*, p. 39.

(b) *Jarman on Wills*, p. 2.

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Legitimacy of
inheritors.

The question in *Birtwhistle v. Vardill*, before which decision the law on this point can hardly be regarded as settled, was whether a child born in Scotland, of parents domiciled there, before their marriage, being admittedly legitimate by the law of Scotland, was legitimate for the purpose of taking English lands by inheritance; and after two arguments before the House of Lords, it was solemnly decided that he was not, since an heir must be, in Lord Coke's words, "*ex justis nuptiis procreatus; nam heres legitimus est quem nuptiæ demonstrant.*" It has been already pointed out that this decision was arrived at in opposition to the opinion of Lord Brougham, and that it is in conflict with the view taken on the question of legitimacy by the jurists of almost all other nations; but the general rule, that the succession to real estate is governed in all respects by the *lex loci rei sitæ*, is established by it for all practical purposes. In the words of Wheaton (*Elements of International Law*, § 80), the "law of the place where real property is situate governs exclusively as to the tenure, the title, and the descent of such property," while the English law alone, when it speaks as the *lex situs*, demands that the heir should be legitimate by the law of his domicil as well. Thus, as has been already mentioned, a heritable Scotch bond in the possession of an English testator is real estate, and in the absence of a will effectual to pass Scotch realty, descends to his heir-at-law (a). And where a Scotch heir elected to take Scotch realty by descent in opposition to an English will, it was held by Lord Selborne that the doctrine of marshalling did not apply, and that the incidents of the succession to the Scotch realty were governed by the *lex loci rei sitæ* alone (b). In the case last cited, Lord Selborne says, "In our judgment all questions as to the burdens and liabilities of real estate situate in a foreign country, in the absence of any trust or personal contract (which might

(a) *Buccleuch v. Hoare*, 4 Madd. 467; *Johnstone v. Baker*, 4 Madd. 474, n.; *Jerningham v. Herbert*, 4 Russ. 388.

(b) *Harrison v. Harrison*, L. R. 8 Ch. 342, 346.

make a difference), depend simply upon the law of the country where the real estate exists." So where the heir of a Scotch estate filed a bill in England to have his estate exonerated from a heritable bond by the application of personal estate in England, Sir J. Leach held that the question whether he had an equity to be exonerated was to be determined by the *lex loci rei sitae*, and not by the law of the country where the personal estate happened locally to be (a). Almost exactly the same question had previously arisen in *Drummond v. Drummond* (b); but it appeared there that the intestate had been domiciled in England at the time of his death, which was not stated to have been the case in *Elliott v. Minto*. The decision there also was in favour of the *lex loci rei sitae*. In another case, cited by Sir W. Grant at the same time as *Drummond v. Drummond*, the Scotch heir was also one of the next of kin, and claimed his share in the personality of the intestate, who had died domiciled in England. By the Scotch law, he was not entitled to do so except on condition of collating or bringing into hotchpot the real estate, so as to form one common subject of division; but it was held that the English law was to be followed, and that he was entitled to share in the personality without fulfilling this condition (c). The real analogy between this case and that of *Drummond v. Drummond* is perhaps not very close, but it appears correct enough to say that the conditions on which a man is to share in personality must be prescribed by the law of the intestate's domicil alone (d). In *Drummond v. Drummond* the question was not as to the conditions under which the next of kin, who happened to be also the heir to the Scotch estate, was to take the English personality (as in *Balfour v. Scott*); but as to the right of the heir to the Scotch estate, in that character, to have his estate exonerated from debts to which it alone was liable by Scotch law. Upon the general principle ex-

Equities
affecting heir.

(a) *Elliott v. Minto*, 6 Madd. 16.

(b) Cited in *Brodie v. Barry*, 2 Ves. & B. 131.

(c) *Balfour v. Scott*, 6 Bro. P. C. 550; 5 Ves. 750; S.C. in *Brodie v. Barry*, 2 Ves. & B. 131.

(d) *Infrà*, Chap. VII. (iii.)

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Foreign land
not burdened
except by the
lex situs.

pressed in the *dictum* of Lord Selborne, just cited, that all questions as to the burdens and liabilities of real estate situate in a foreign country are to be referred to the law of the country where the real estate is situate (*a*), there can be no doubt that the decisions in *Elliott v. Minto* and *Drummond v. Drummond* were right. The latter case was indeed cited with approval by Lord Hatherley, in a case which went comparatively recently before the House of Lords (*b*). In *Maxwell v. Maxwell*, a domiciled Englishman, by a testamentary disposition in the Scotch form, gave certain real estate in Scotland, and by a subsequent will in the English form, after declaring that the trusts of his present will should not affect the Scotch estate, nor put to his election any person who should claim under both instruments, gave the residue of his estate upon trusts for sale and payment of "all his just debts" and legacies. He subsequently charged the Scotch estate with a debt of £14,000, by means of a Scotch heritable bond, and purchased other real estate in Scotland, which passed by intestacy to his heir. It was held, first, that the residuary estate was liable to payment of the £14,000 in exoneration of the Scotch estate—thus adopting the interpretation of the *lex domicilii* as to the expression "all my just debts"—and secondly, that the Scotch heir, who took something under the will, was not bound to elect, but had the same right to the real property that he would have had if there had been no will. "We have not here," said Lord Hatherley (*c*), "a case like that of *Drummond v. Drummond*, in which, there being a charge on land in Scotland which was the debt of the intestate, and there being also personal property of the intestate, the property of the intestate was administered according to English law, England being the country of his domicil. There the Court held that the person himself—the *præpositor*—had expressed no intention, but had left his property to be

(*a*) *Harrison v. Harrison*, L. R. 8 Ch. 346.

(*b*) *Maxwell v. Maxwell*, L. R. 4 H. L. 501; S.C. *sub voc.* *Maxwell v. Hyslop*, L. R. 4 Eq. 407.

(*c*) At p. 514.

disposed of as the law might direct, as affecting his two classes of property. The law would apply his Scotch estate according to the existing law in Scotland. That would involve the necessity of the Scotch creditors taking his remedy out of the Scotch estate, and the necessity, therefore, of the heir to the Scotch estate bearing that burden; and the consequence would be that the person entitled to the personal estate in England would not be liable to bear that charge, which would primarily be a charge upon the Scotch estate. But here we are dealing with *a testator's intention, as expressed in his will.*" And Lord Westbury says in the same spirit (a), "*Drummond v. Drummond* has nothing to do with this case. *Drummond v. Drummond* was nothing more than an illustration of the settled principle, that real estate is governed by the *lex loci*. The Scotch owner of the estate in that case took it according to the law of Scotland, *cum onere*." The other point, with regard to the want of any obligation on the Scotch heir to make election, and bring his land into hotchpot in order to take under the will, was similarly decided with reference to the intention of the testator. An heir to foreign realty may take it unconditionally according to the law of the *situs*, and nevertheless share under an English will which was ineffectual to devise it, *unless it appear distinctly from the terms of the will that the testator intended that he should not be allowed to do so* (b). In *Balfour v. Scott* (c) there was an intestacy, so that no such intention could be suggested, and the Scotch heir accordingly took the Scotch land according to Scotch law, and a share of the personality as next of kin according to English law. So in *Johnson v. Telfourd* (d), it was held that an heir of Scotch real estate was not put to his election by *general expressions*, unless it was clearly to be collected

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Foreign heir
—when put to
his election.

(a) At p. 519. See as to the exoneration by personality of real estate, *Mellish v. Valins*, 2 J. & H. 194; *Eno v. Tatham*, 3 De G. J. & S. 443; and 17 & 18 Vict. c. 113 (Locke King's Act).

(b) *Harrison v. Harrison*, L. R. 8 Ch. 342; *ante*, p. 156.

(c) 2 Ves. & B. 131, n.

(d) 1 Russ. & My. 254; and see *Allen v. Anderson*, 5 Hare, 163.

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**Intention of
testator—
foreign heir
bound by.**

from the words used that the testator meant to pass his Scotch estate to the uses of the will. "Where the testator uses only general words," said Sir John Leach, "it is to be intended that he means those general words to be applied to such property as would by its nature pass by his will, and to the uses therein expressed." And this doctrine was accepted in *Maxwell v. Maxwell* (*a*), where the will purported to devise to trustees all the testator's real and personal estate wheresoever and whatsoever. It was invalid as to certain Scotch heritable bonds—real property by the Scotch law—and it was held that the Scotch heir was not bound to make election. Lord Cranworth said, "The designation of the subject intended to be affected by the instrument in general words imports *prima facie* that property only upon which the instrument is capable of operating." If the will had specifically devised the heritable bonds in question, the intention would of course have been manifest, and the Scotch heir could not have taken them in opposition to the will at the same time that he received a benefit under it. This was actually the ground of the decision in *Brodie v. Barry* (*b*), where the will expressly devised the testator's real estate in Scotland, although it was ineffectual to do so, and the Scotch heir was of course put to his election.

In cases of intestacy, it is apparent that these considerations of the intention of the deceased owner cannot arise, and the proper laws will therefore be left to operate upon immovable and movable property respectively. The burdens of the former, as also its claims to exoneration (*c*), will therefore be decided by the *lex situs*; the distribution of the latter, and the conditions under which those entitled may share in it (though they may also be the heirs of foreign immovables), by the *lex domicilii* of the intes-

(*a*) 2 De G. M. & G. 705 (1852). This case, though not referred to by Mr. Westlake, is cited with approval by Malins, V.C., in *Maxwell v. Hyelop*, L. R. 4 Eq. 415.

(*b*) 2 Ves. & B. 131.

(*c*) *Elliott v. Minto*, 6 Madd. 16; *Drummond v. Drummond*, 2 Ves. & B. 131.

tate (*a*). It is hardly necessary to say that when the foreign heir elects to take in opposition to a will purporting to deal with his inheritance, there is, *quoad* the foreign land, an intestacy, though the will remain by the law of the testator's domicil as to the movable personality (*b*).

(vi.) *Assignment of Immovables by Bankruptcy.*—It is Assignment of immovables on bankruptcy —how far extra-territorial.
 said by Wheaton, that the question how far a bankruptcy declared under the laws of one country will affect the real and personal property of the bankrupt situate in another State "is one of which the usage of nations, and the opinions of civilians, furnish no satisfactory solution. Even as between co-ordinate States, belonging to the same common Empire, it has been doubted how far the assignment under the bankrupt laws of one country will operate a transfer of property in another. In respect to real property, which generally has some indelible characteristics impressed upon it by the local law, these difficulties are enhanced in those cases where the *lex loci rei sitae* requires some formal act to be done by the bankrupt, or his attorney specially constituted, in the place where the property lies, in order to consummate the transfer." The difficulty, as it now presents itself to English Courts, is rather to construe properly the provisions of the statutes relating to bankruptcy in force for the time being, so as to understand what property they affect to convey to the English trustee or assignee of the bankrupt. The Act of 1869 ^{statutes.} enacts (s. 15 subs. 3) that "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him during its continuance," shall pass to the trustee. The Bankruptcy Act of 1849 was limited in terms to real estate "in England, Scotland, Ireland, or any of the dominions, plantations, or colonies belonging to her Majesty" (*c*). No such limitation is contained in the present Act in words, nor, on the other hand, is there

(*a*) *Balfour v. Scott*, 2 Ves. & B. 131; S.C. 6 Bro. P. C. 550, and *ante*, p. 161.

(*b*) *Harrison v. Harrison*, L. R. 8 Ch. 342.

(*c*) Sect. 142.

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anything to extend its operation to the real property of the bankrupt situate within her Majesty's dominions, but out of England. There is nothing said in the definition of "property" (s. 4) as to its situation, and s. 2 says that the Act shall not apply to Scotland or Ireland, except where expressly provided; but the words are large enough, and are no doubt intended, to include all real property situate within her Majesty's dominions (*a*). It may be questioned, however, whether this would be their effect, if construed strictly; as the common law rule undoubtedly limits the control over immovable property in such matters to the *lex situs* (*b*).

By the Scotch Bankruptcy Act, 19 & 20 Vict. c. 79, the bankrupt's real estate in England, Ireland, or any of the dominions of the British Crown, will vest in the Scotch trustee. By s. 268 of the Irish Bankruptcy Act, 1857, all a bankrupt's estate, wherever situate, is vested in his assignees; a provision which is not repealed by the Irish Bankruptcy Act, 1872, 35 & 36 Vict. c. 58.

Obligation of
bankrupt to
assign foreign
land.

In *Selkirk v. Davis* (*c*), it was held that a bankrupt under an English commission of bankruptcy could not be compelled to assign his foreign real estate to his assignees, though it was suggested that he might be indirectly obliged to do so by withholding his certificate. The reasoning, however, of Lord Selborne in *Harrison v. Harrison* (*d*), already quoted on a different point, seems directly applicable. Unless there is a personal equity affecting the owner of real estate situate abroad, an English Court cannot claim to control such estate by acting on him, and it is quite clear that no English Court would recognise such a claim, as to English land, by the trustees or assignees under a foreign bankruptcy. In a later case (*e*), Parke, B., after saying that generally

(*a*) Williams on Bankruptcy, p. 97.

(*b*) Story, Conflict of Laws, 376, 463.

(*c*) 2 Dow 245; see *Stein's Case*, 1 Rose, 462; *Benfield v. Solomon*, 9 Ves. 77.

(*d*) L. R. 8 Ch. 342; see p. 127, *suprà*.

(*e*) *Cockerell v. Dickens*, 3 Moo. P. C. 98, 133; see also *Ex parte Blakes*, 1 Cox, 398.

speaking real estate is governed by the *lex loci rei sitae*, and not transferred by an assignment according to the law of the domicil of the owner, proceeded, "We have the authority of Lord Eldon in *Selkirk v. Davis*, in the analogous case of an English commission of bankruptcy, that a bankrupt cannot be compelled directly to assign his real estate to his assignees; and though there are indirect methods, as withholding their certificate, or by creditors assigning their debts to others in order to obtain execution against the real estates, neither of these are in the power of the assignees as such, *nor would the first of them seem to be in any case properly applied.*" It would, however, seem that s. 19 of the Bankruptcy Act, 1869, imposed such a duty on the bankrupt, by enacting that the bankrupt should, to the utmost of his power, aid in the realization of his property, and the distribution of the proceeds amongst his creditors, and generally do all such acts and things in relation to his property and the distribution of the proceeds among his creditors, as may be reasonably required by the trustee or prescribed by rules of Court.

(vii.) *Alienation of Immovable Property on Marriage.*—

The nature of the rights acquired by the husband and wife respectively at marriage in the immovables of the other is decided absolutely, according to English law, by the *lex situs*. According to Story (a), "it may be affirmed without hesitation, that independent of any contract, express or implied, no estate can be acquired by operation of law in any other manner, or to any other extent, or by any other means, than those prescribed by the *lex rei sitae*. Thus no estate in dowry, or tenancy by the courtesy . . . can be acquired, except by such persons, and under such circumstances, as the local law prescribes." Westlake says that on this point there is no doubt but that in England the *lex situs* would prevail, as it does in America (b). Against it has been set up by foreign jurists the claim of the law of the matrimonial domicil, on the ground, among others, that the presumed

Rights in
immovables
acquired by
marriage.

(a) Conflict of Laws, §§ 448, 454.

(b) Priv. Int. Law, § 95.

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intention of the parties was that their mutual rights should be regulated by that law (*a*) ; though even those who maintain this view do not contend that the law of the matrimonial domicil can prevail as to any of these rights in direct opposition to any prohibition or restriction imposed by the *lex situs*. It has also been suggested that the law of the place where the marriage is celebrated is the proper one to govern the rights of husband and wife respectively in all the property, movable and immovable, of the other ; and Lord Meadowbank, in 1814, used language in a Scotch case which has been quoted in support of such a view. “ When a lady of fortune having a great deal of money in Scotland, or Stock in the banks or public companies there, marries in London, the whole property is *ipso jure* her husband’s. It is assigned to him. *The legal assignment of a marriage operates without regard to territory all the world over*” (*b*). In *Selkirk v. Davis* (*c*), however, Lord Eldon limited the doctrine here laid down to personal property, and it is beyond a doubt that as to realty, at any rate, it is unsound. The question as to the proper law to regulate the effect of marriage on the movable property of the husband and wife will be discussed subsequently.

SUMMARY.

ALIENATION OF IMMOVABLE PROPERTY BY ACT OF LAW.

p. 159.

(v.) *Succession on Intestacy*.—The *lex situs* determines the heir ; and the English law, speaking as the *lex situs*, requires that he should be legitimate not only according to its own rules, but by the law of his domicil also.

p. 160.

The burdens, liabilities, and claims, of immovable property in the hands of the heir, in the absence of any equity arising from trust or contract, depend upon the *lex situs*.

pp. 161–163.

But the conditions under which the heir of foreign land may share in the (movable) personality of the intestate,

(*a*) Story, Conflict of Laws, § 449; Westlake, Priv. Int. Law, § 369.

(*b*) Royal Bank of Scotland v. Cuthbert, 1 Rose, 481.

(*c*) 2 Rose, 97.

depend upon the law of the intestate's domicil, and not upon the *lex situs* of the foreign land.

These rules, in cases of intestacy, are invariable, because there can be no demonstration of the intention of the owner that the foreign land should either bear or be exonerated from any particular debts, as there may be when a testamentary disposition has been made.

(vi.) *Transfer on Bankruptcy*.—Under an English bankruptcy, the English bankruptcy law affects to vest in the trustee all the movable and immovable property of the bankrupt, wherever situate; and the Irish bankruptcy law is the same. The Scotch Bankruptcy Act is confined in terms to real estate within the British dominions; and on principles of international law, the English statute cannot be given a wider interpretation.

A bankrupt is therefore not compellable, apparently, to assign foreign land to his trustee or assignee in bankruptcy, unless there is some personal equity attaching to him by which the *forum* of the bankruptcy can indirectly compel him to do so by acting *in personam*. It is not clear how far such an assignment can properly be made a condition of his discharge.

(vii.) *Transfer on Marriage*.—The rights of husband and wife in and to the English immovables of either are decided by English law, as the *lex situs*. *Semblé*, the *lex situs* has an equal claim to prevail when the situation of the immovables is foreign, whatever the matrimonial domicil.

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Movables
and personal
property dis-
tinguished.

CHAPTER VII.

MOVABLE PERSONAL PROPERTY.

(i.) *Jurisdiction as to Movable Personal Property.*

IT has been already noticed, while treating of the principle that it is the *lex situs* which must decide what does and what does not fall within the category of real or immovable estate (*a*), that the English classification of all property into *real* and *personal* does not correspond exactly with that adopted by foreign jurists and systems of jurisprudence which are founded on the civil law, and that an ambiguity is consequently involved in the use of the words *personal* and *movable* as synonymous. The comparatively modern nature of chattel interests in land, which were unknown to the feudal system, and could not conveniently be subjected to its rules, caused them to be classed with the only other kind of property then recognised by the law, *goods and chattels*; being given the distinguishing name of *chattels real*, inasmuch as they were said to "savour of the realty" (*b*). But though such chattel interests are still, strictly speaking, personal property, they are so merely in name, and only in the contemplation of the English law; and are governed like other immovables, by the *lex loci rei sitae* only (*c*). It will be shewn directly that personal estate generally is governed by the law of the domicil of the owner; but this is so, not by any special law of England, but—as Lord Selborne expresses it in the case just cited—by the deference which, for the sake of international comity, the law of England pays to the law of the civilized world

(*a*) *Suprà*, p. 139, 140.

(*b*) Williams, Personal Property, p. 2.

(*c*) Jarman on Wills, vol. i. p. 4, n; *Freke v. Lord Carbery*, L. R. 16 Eq. 461.

generally. But this general law only applies the law of the domicil to such personal estate as comes within its category of movables, according to the maxim "*mobilia sequuntur personam*," on which it is based. Consequently the comity of nations does not demand that England should concede the control of English chattels real to the law of the domicil of the owner, simply because English law chooses to include such chattels under the classification of personal property, and it must be borne in mind throughout that in fact such a concession is not made (*a*). As the term "movables" is not one familiar to English law, it has been thought better to retain the English classification of real and personal property while treating of this subject; but what is subsequently said as to the law which governs personal property does not extend to chattel interests in realty, and must be considered as applicable to *chattels personal* alone.

With regard, then, to all personal property other than *chattels real*, a rule very different to that which obtains with regard to "immovables" prevails. In the words of Lord Selborne (*b*), "The maxim of the law of the civilized world is *mobilia sequuntur personam*, and is founded on the nature of things. When *mobilia* are in places other than that of the person to whom they belong, their accidental *situs* is disregarded, and they are held to go along with the person." The same principles were laid down by Lord Loughborough, in a judgment cited with approbation by Story (*c*). "It is a clear proposition, not only of the law of England, but of every country in the world where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person

(*a*) *Freke v. Lord Carbery*, L. R. 16 Eq. 461; *Thomson v. Advocate-General*, 12 Cl. & F. 1; *Wallace v. Attorney-General*, L. R. 1 Ch. 1; *Jarman on Wills*, vol. i. p. 4, n. The authorities cited by the later editors of *Jarman* in support of the opposite view must now be regarded as overruled; Story, *Conflict of Laws*, § 447.

(*b*) *Freke v. Lord Carbery*, L. R. 16 Eq. 466.

(*c*) Story, *Conflict of Laws*, § 380.

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of the owner." With respect to the disposition of it, with respect to the transmission of it, either by succession or the act of the party, it follows the law of the person (*a*). This personal law is, of course, that of the domicil of the person (*b*). It is true that Lord Loughborough, in the judgment just quoted from, goes on to say that when a man dies, it is the law of the country of which he was a subject that will regulate the succession to his personal property; but it is obvious that this was a mere inaccuracy of expression, and the case Lord Loughborough himself cites in support of his proposition (*c*) shews that domicil, and not nationality, was really in his Lordship's mind. In a case which has been already frequently cited for another important proposition, Abbott, C.J., said: "Personal property has no locality. And even with respect to that, it is not correct to say that the law of England gives way to the law of a foreign country, but that it is part of the law of England that personal property should be distributed according to the *jus domicilii*" (*d*). It was said by Bayley, B., in another case, "The rule is that personal property follows the person, and is not in any respect to be regulated by the *lex situs*; and if in any instances the *situs* has been adopted for the rule by which the property is to be governed, and the *lex loci rei sitae* resorted to, it has been improperly done. Wherever the domicil of the proprietor is, there the property is to be considered as situate" (*e*). It is unnecessary to multiply quotations in support of the general principle, which, according to Story, has been constantly maintained, both in England and America, with unbroken confidence and general unanimity (*f*).

(*a*) *Sill v. Worswick*, 1 H. Bl. 690.

(*b*) *Doglioni v. Crispin*, L. R. 1 H. L. 301; *Enohin v. Wylie*, 10 H. L. C. 1.

(*c*) *Pipon v. Pipon*, Ambl. 25.

(*d*) *Birtwhistle v. Vardill*, 5 B. & C. 451.

(*e*) *In re Ewin*, 1 C. & J. 156.

(*f*) See, in addition to the cases already cited, *Potter v. Brown*, 5 East, 130; *Bruce v. Bruce*, 2 B. & P. 229; *Somerville v. Somerville*, 5 Ves. 570; *Thorn v. Watkins*, 2 Ves. 37; *Countess D'Acunha's Case*, 1 Hagg. Eccl. 287; *Hunter v. Potts*, 4 T. R. 182, 192; *Phillips v. Hunter*, 2 H. Bl. 402; *Cockerell v. Dickens*, 3 Moo. P. C. 98.

It may be added here that the fact of a specific chattel, the subject-matter of a contract, having been brought within the jurisdiction of an English Court, will justify that Court in assuming control over the chattel in question, so as to grant an injunction against the removal of the chattel, and to entertain a suit for the specific performance of the contract respecting it (*a*). It is true that in one sense, in the case referred to, England was the *locus solutionis*, or place of performance of the contract, but it is by no means clear that the decision does not go some length in establishing the proposition that the mere situation of personal property, even if transient, confers upon the *forum situs* jurisdiction to deal with contracts that concern it. The same principle may be traced, though not unmixed with other considerations, in the cases already referred to, in which the fact that the subject-matter of a foreign settlement of personal property was within the English jurisdiction at the time of the making of the settlement, was regarded as a reason for applying English law to the interpretation and regulation of its provisions (*b*). And it will be noticed in the proper place that the Judicature Acts, 1873 and 1875, permit service without the jurisdiction, *inter alia*, whenever the subject-matter of the action is land, stock, or other property situate within the jurisdiction, thus accepting the same principle, to the extent, at any rate, of entertaining and hearing the claim (*c*).

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Jurisdiction
arising from
actual situa-
tion.

SUMMARY.

JURISDICTION AS TO PERSONAL PROPERTY.

Personal property, according to the English law, is not p. 170. coincident with the class of *movables* contemplated by the law of nations, but includes certain *immovables* as well. The terms are consequently not equivalent.

(a) *Hart v. Herwig*, L. R. 8 Ch. 860.

(b) *Van Grutten v. Digby*, 31 Beav. 561; see *infra*, Chap. VII. (v.)

(c) Judicature Acts, 1873, 1875, Sched. Ord. xi. r. 1; see *infra*, Chap. X.

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The maxim "*mobilia sequuntur personam*" applies to movables only; i.e., to such personal property as falls under that class.

Such personal property as is immovable comes under the rules which relate to the jurisdiction over immovables generally.

- p. 171. Movables are regarded as situate in the country of the domicil of the owner, wherever they may be in fact; and the law of his domicil alone has consequently jurisdiction to deal with them for the purpose of distributing them among his creditors or successors. The situation in fact of movables within a particular jurisdiction will, nevertheless, warrant the local Courts in assuming to deal with them for certain purposes, at any rate so far as to entertain actions based on contracts which concern them, or the right to their possession.
- p. 172.

ALIENATION OF PERSONAL PROPERTY.

The general principle being that movable personal property is governed by the law of the owner's domicil, it will be as well to consider its application more particularly with regard to its alienation. Alienation of personal property is either by the act of the owner, or by the act of the law. In the first of these cases it is either by transfer *inter vivos*, or by devise. In the second case it may be either by succession, by assignment on bankruptcy, or by the operation of marriage. Each of these cases requires separate consideration.

Transfer of
movables.

(ii.) *Alienation by transfer inter vivos.*—Notwithstanding the general principle that movables are governed by the law of the domicil of the owner, it cannot be taken as established that an alienation of personal chattels which is valid by the law of the transferor's domicil, will be accepted everywhere, even where there is no actual prohibitory or restrictive law in the country where the chattels are in fact situated. That there may be such a

prohibitory or restrictive law is obvious. "In one sense personal property has locality; that is to say, if tangible, it has a place in which it is situated; and if invisible (consisting of debts) it may be said to be in the place where the debtor resides; and of these circumstances the most liberal nations have taken advantage, by making such property subject to regulations which suit their own convenience" (a). The question therefore arises, whether the English law admits that the *lex situs* has the right to impose such restrictions, or whether it considers that compliance with the law of the transferor's domicil is sufficient in all cases? It is obvious that this branch of the subject is much entangled, in the majority of cases, with the operation of the *lex loci contractus celebrati* upon the perfection of the transfer; but in certain cases, the *lex situs* necessarily speaks for itself. Thus with contracts for the transfer of public funds or stocks, which must obviously be carried out, to be effectual at all, in compliance with the law of the country to which they belong (b), so that until the forms prescribed by it have been complied with, the contract is necessarily unperformed and remains in intention only. But the laws of some countries refuse to acknowledge the validity of any assignment of chattels until it has been perfected by delivery, and it becomes a question how far English law regards them as justified in imposing such a restriction. In *Simpson v. Fogo* (c), the subject received some consideration from Lord Hatherley. Then the Courts of Louisiana had refused to recognise the rights of a mortgagee of a British ship, which had been taken by the mortgagors to New Orleans, and was there attached by other creditors without ever having been delivered to the mortgagees. The ship having come again within British jurisdiction, the mortgagees filed a

(a) *Per Tilghmon*, C.J., in an American case, *Moreton v. Milne*, 6 Binn. 361.

(b) *Robinson v. Bland*, 2 Burr. 1079; *Hunter v. Potts*, 4 T. R. 182, 192; *Story, Conflict of Laws*, § 383.

(c) 32 L. J. Ch. 249; 1 H. & M. 195.

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Valid transfer
by the *lex
situs*.

bill to enforce their rights, and Lord Hatherley refused to recognise the judgment and order of the Louisiana Court, under which the ship had been sold, as being directly contrary to the comity of nations. It is to be remarked that in this particular case the transfer by way of mortgage had been completed long before the ship came within the Louisiana jurisdiction, and Lord Hatherley said that, in his opinion, the American Court was bound to have recognised the principle that a title which a man has legally acquired in one country shall be a good title to him all over the world ; further citing with approval the language of an American judge in another case : "If, therefore, according to the *lex loci contractus*, that of the domicil of both parties, the sale transfers the property without delivery, it does so *eo instanti*, or not at all. If two persons in any country choose to bargain as to the property which one of them has in a chattel not within the jurisdiction of the place, they cannot expect that the rights of persons in the country in which the chattel is will there be permitted to be affected ; but if the chattel be at sea or in any other place, if any there be, in which the law of no particular country prevails, the bargain will have its full effect *eo instanti* as to the whole world, and the circumstance of the chattel being afterwards brought into a country, according to the laws of which the sale would be invalid, would not affect it" (a). It is to be observed that in *Simpson v. Fogo* the assignment had been completed before the chattel came within the Louisiana jurisdiction, so that the assumption of the Louisiana Court to pronounce upon its ownership must be regarded as wholly unwarrantable from an English point of view. Had the ship been at New Orleans when the mortgage was effected, the validity of the attempted assignment would have been prohibited by the *lex loci rei sitae*, and Lord Hatherley's strictures upon the Louisiana judgment

(a) *Thuret v. Jenkins*, 7 Martin, 353.

would have been uncalled for (*a*). The decision, however, in *Simpson v. Fogo*, cannot now be regarded as an authority for the proposition that a foreign judgment is examinable by an English Court for a mistake in private international law, or even for a violation of the rights of nations. It is established by the decision of the House of Lords in *Castrique v. Imrie* (*b*) that the validity of a foreign judgment can be impeached on no such grounds, except only in cases where the foreign Court has wrongfully assumed a jurisdiction which did not properly belong to it. *Blackburn*, J., in that case, while commenting on *Simpson v. Fogo*, clearly indicates that the judgment may be supported without impeaching the general proposition that a foreign judgment cannot be examined for error in law, domestic or international, except as to the grounds of its jurisdiction ; and if the decision is inconsistent with this theory, it must be regarded as overruled (*c*).

Next, with regard to the validity of a transfer of personal chattels which is only good by the *lex loci rei sitae*, and not supported by the *lex domicilii*, it appears to have been decided by the case of *Cammell v. Sewell* (*d*) that such a transfer is regarded as good and sufficient by English law. In that case a cargo of timber which had been wrecked on the coast of Norway was sold there by the captain of the vessel, improperly according to English law, but under such circumstances as to convey a good title to a *bonâ fide* purchaser according to the law of Norway. The timber having been re-sold and brought to England, the English merchant brought trover for it, and it was decided (Byles, J., *dissentiente*) that the action could not be maintained. In pronouncing the judgment of the majority of the Court, Crompton, J., said, after stating the effect of the Norwegian law on the question : "It does not appear to us that there is anything so barbarous or monstrous in this state of the law that we can say that it should not be

(*a*) *Liverpool Marine Co. v. Hunter*, I. R. 3 Ch. 481.

(*b*) L. R. 4 H. L. 414.

(*c*) *Infrà*, Chap. XI.

(*d*) 27 L. J. Ex. 447 ; 3 H. & N. 617 ; S.C. on appeal, 29 L. J. Ex. 350.

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recognised by us. Our own law as to market overt is analogous Many cases were mentioned in the course of the argument, and more might be collected, in which it would seem hard that the goods of foreigners should be dealt with according to the laws of our own or of other countries. Among others, our laws as to the seizure of a foreigner's goods for rent due from a tenant, or as to the title gained in them, if stolen, by sale in market overt, might appear harsh. But we cannot think that the goods of foreigners would be protected against such laws, or that if the property once passed by virtue of them, it would be changed by being taken by the new owner into the foreigner's own country. We think that the law on this subject was correctly stated by the Lord Chief Baron (*a*) in the course of the argument in the Court below, where he says, 'If personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere;' and we do not think that it makes any difference that the goods were wrecked, and were not intended to be sent to the country where they were sold. We do not think that goods which were wrecked here would on that account be less liable to our laws as to market overt, or as to the landlord's right of distress, because the owners did not foresee that they would come to England" (*b*). The case of "*The Segredo*" (*c*), which was relied upon in the argument in *Cammell v. Sewell* as an authority for the plaintiff's contention, was referred to with disapprobation in the course of the judgment just quoted from, and the Court said that if Dr. Lushington's judgment in that case was relied on as an authority that the effect of a law of a foreign country, as to the passing of property in a foreign country, was to be disregarded, they were prepared, sitting as a Court of error, to dissent from it. So, it seems that the Dutch law as to market overt might have had the effect of passing the property in a cargo sold in the Cape of

(*a*) 27 L. J. Ex. 447.

(*b*) 29 L. J. Ex. 353.

(*c*) Otherwise "*Eliza Cornish*," 1 Spinks, Eccl. & Adm. 36.

Good Hope, when the law of Holland prevailed there, if the circumstances of the knowledge of the transaction had not taken the case out of the provisions of such law (a). In the "*Gratitudine*" (b), speaking of the circumstances under which the captain of a ship might exercise his judgment as to the sale of a cargo in emergencies, Lord Stowell said, "If the master acts unwisely in that decision, still the foreign purchaser will be safe under his acts."

The general principle thus laid down, that if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere, came under the notice of the House of Lords in the more recent case of *Castrique v. Imrie* (c). That case was decided on the principle of the validity of a foreign judgment *in rem*, which, in the words of Blackburn, J., in that case, is in truth but a branch of the more general principle which is enunciated in *Cammell v. Sewell*; and it was not there necessary to resort to any such larger principle, or to inquire what qualifications, if any, ought to be attached to it as a general rule. Nevertheless Blackburn, J., intimated his opinion that the general principle of the validity of a transfer made according to the *lex loci rei sitae* was correct, though no doubt it might be open to exceptions and qualifications (d). It would be difficult, perhaps, to name a general principle of which the same might not be said; and the opinion of Keating, J., in the same case, was avowedly and entirely based on the decision in *Cammell v. Sewell*, and the principles to be drawn from it.

The principle of *Cammell v. Sewell* is entirely consistent with the decision in *Hooper v. Gumm* (e), on appeal from the judgment of Wood, V.C. There certain ship-builders in America had built several ships, mortgaged them there, sent them to England for sale, sold them there, and paid

(a) *Freeman v. E. I. Co.*, 5 B. & Ald. 617, explained by Crompton, J., in *Cammell v. Sewell*, 29 L. J. Ex. 353.

(b) 3 Rob. Adm. Rep. 258.

(d) *Castrique v. Imrie*, L. R. 4 H. L. 429.

(c) L. R. 4 H. L. 414.

(e) L. R. 2 Ch. 282.

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the mortgagees in America. The mortgages were duly registered in America; but notice of the mortgage being indorsed on the certificate of registry, and having in one case impeded the sale, it was agreed that no such notice should be indorsed in future. Another ship was accordingly sent over and sold, no notice of the American mortgage being indorsed on her certificate of registry, and the American ship-builders having failed after receiving the money, the mortgagee filed his bill against the purchaser. He failed eventually, on the ground that he had so acted as to suppress the mortgage, and make the ship-builders his agents for the sale, but the language of Turner, L.J., is important with reference to the validity of the sale itself. “In my opinion the law of this country ought to govern the decision of the case; *for the purchase of the ship, on which the rights of the question depend, was made and completed in this country.* In saying this, however, I must not be understood to mean that the shipping law of America is not to be regarded in deciding the case; on the contrary, I think that great regard must be paid to it. In order to determine what the rights of these parties now are, it must be ascertained what their rights were at the time when the purchase in question was made, and in order to ascertain this, resort must be had to the American shipping law. The rights of the parties stood upon that law at the time when this purchase was made, and I apprehend that where rights are acquired under the laws of foreign States, the law of this country recognises and gives effect to those rights, unless it is contrary to the law and policy of this country to do so.” It will be seen from the facts in *Simpson v. Fogo* (a), that the American Courts are not equally ready to recognise the rights of property which the laws of foreign States have conferred; but it is plain from the above citation, that in *Hooper v. Gumm* the validity of the sale in England was referred to the English law alone, and the fact that English law in that case was unusually ready to guide itself by the rules

(a) 1 J. & H. 18; 1 H. & M. 195.

of foreign jurisprudence does not affect the principle. So in *Castriques v. Imrie*, already referred to, where a sale had been decreed under the judgment of a French Court, it was said that even if the English tribunal could review the foreign judgment, the sale in France, made under it, would remain valid, and the title of the purchaser be protected (*a*).

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The decisions in the cases just cited do not in themselves go beyond the question of the validity of a transfer of the property in personal chattels; but cases may easily arise where the complete property in a chattel is not intended to pass, but a mere lien or possessory right conferred, and it would seem that the creation of such a lien is in like manner subject to the *lex loci rei sitae*. In the case of *Harmer v. Bell (The Bold Buccleugh)* (*b*) it was held that the lien, which attaches by English law on a ship which causes damage by collision, travels with the vessel into whatever jurisdiction and into whosesoever possession it may pass, and when carried into effect by a proceeding *in rem*, relates back to the period when it first attached. The principle of this case, where the lien so created was held to prevail against a subsequent *bonâ fide* purchaser without notice, would logically demand the recognition of a lien created in another jurisdiction, and by a law different from that of the Court which was called upon to enforce it, but as the collision happened in English waters, no conflict of law arose. In the much older case of *Inglis v. Usherwood* (*c*), a lien created by Russian law on a chattel then within its jurisdiction, which the English law would not have conferred, was recognised by the Court, but here again there was no real conflict of law, as the contract out of which the transaction arose was entered into by correspondence between merchants in London and St. Petersburg, and the vessel was chartered by the English consignee, so that the *lex*

(*a*) L. R. 4 H. L. 414.

(*b*) 7 Moo. P. C. 267. The *dictum* in *The Volant*, 1 W. Rob. Adm. 387, that damage by collision gives no lien upon the ship in fault, is overruled.

(*c*) 1 East, 515.

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loci contractus, as far at least as the rights of the Russian merchant who sought to enforce his lien were concerned, was the same as the *lex loci rei sitae*. The plaintiff was the assignee of a bankrupt who had commissioned a Russian merchant to purchase certain goods for him and ship them on board a vessel of which the defendant was the captain, chartered by the bankrupt. The goods were shipped, but the shipper hearing of the consignee's bankruptcy, exercised the right of lien given him by the Russian law under such circumstances, and the action was against the captain of the ship for delivering up the cargo to his order. Thus whether the Russian law was accepted as conclusive because it was that of the place where the vendor had bound himself to perform his contract (*a*), or that of the place where the purchaser had concluded the contract by his agent (*b*), or for the reason just stated, that the goods were within its jurisdiction when it assumed to create the lien in question, was immaterial to the decision, which was, however, clearly put on the last mentioned ground.

SUMMARY.

ALIENATION OF MOVABLE PERSONAL PROPERTY BY TRANSFER INTER VIVOS.

pp. 175-180.

When alienation of movable personal property is effected by transfer *inter vivos*, the law regards not so much the person and domicil of the owner, as the act or transfer by which the transfer is effected, and the situation, in fact, of the property transferred.

p. 176.

If the property transferred, and the parties to the transfer, are all within the same jurisdiction, the transfer, according to the law of that jurisdiction, will confer a good title valid everywhere, under the dominion of whatever law the property afterwards passes.

(a) *Lebel v. Tucker*, L. R. 3 Q. B. 77; *Trimbey v. Vignier*, 1 Bing. N. C. 151.

(b) *Pattison v. Mills*, 1 Dow & Cl. 342; *Albion Insurance Co. v. Mills*, 3 Wils. & S. 233.

But such a title will not be conferred if the property, at the moment of the transfer, be within another jurisdiction, by the law of which the attempted transfer is invalid or imperfect.

If the transfer be valid according to the law of the place where the property is in fact situate, the title conferred by it should be recognised as good everywhere, though imperfect by the law of the former owner's domicil, and though the property be afterwards brought within the dominion of that law.

The creation of a lien upon movable personal property is similarly referred to the law of the place where the property was in fact situate at the time when the lien was created.

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(iii.) Succession to Movable Personal Property.

(a) *Disposition of Movable Personal Property by Will.*— Movable successions governed by *lex domicilii*. It is now universally received, both in England and America, as a maxim of private international jurisprudence, that wills of movable personal property are in all cases governed by the *lex domicilii* of the testator (*a*) ; and the law was clearly stated by Lord Westbury in *Enohin v. Wylie*. “It is now put beyond all possibility of question that the administration of the estate of a deceased person belongs to the Court of the country where the deceased was domiciled at his death. All questions of testacy and intestacy belong to the judge of the domicil. To the Court of the domicil belongs the interpretation and construction of the will of the testator. To determine who are the next of kin or heirs of the personal estate of the testator is the prerogative of the judge of the domicil. In short, the Court of the domicil is the *forum concursus*, to which the legatees under the will of a testator, or the

(a) *Potter v. Brown*, 5 East, 130; *Sill v. Worwick*, 1 H. Bl. 690; *Price v. Deuchurst*, 4 My. & Cr. 76; *De Bonneval v. De Bonneval*, 1 Curt. 856; *Dolphin v. Robins*, 1 Sw. & Tr. 37; *De Zichy Ferraris v. Hertford*, 3 Curt. 468; *Enohin v. Wylie*, 10 H. L. C. 1.

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Change of
domicil
between date
of will and
death.

parties entitled to distribution of the estate of an intestate, are required to resort" (a).

The clearness with which it is here stated that the domicil referred to is the domicil of the testator at the time of his death is especially worthy of remark; since it is obvious that a conflict may often arise between that law and the law of his domicil at the time the will was made. According to the continental view, the validity of a will is tested either by the law of the domicil or by the law of the place where it was executed, following the maxim *locus regit actum*, and a change of domicil after execution of the will and before death is therefore immaterial, since the latter principle will support its validity if the first fails (b). But the maxim *locus regit actum* has obtained no recognition in English law, and by the law of domicil is meant, unquestionably, the domicil at the time of the testator's death (c), as Lord Westbury distinctly states, in the judgment just quoted from. English Courts will therefore assume no jurisdiction unless the domicil at the time of the death be English: i.e., unless the change, if any, has been from a foreign to an English domicil. A question then arises as to the validity of wills made under the law of the first domicil, but insufficient according to English law. At common law, there is no doubt that such wills would be invalid (d), and it would seem that this is still the law as to the wills of foreigners domiciled at the time of their death in England. But it is now unnecessary to consider whether a testator, being a British subject, has changed his domicil since making his will (e), since as regards British subjects, it was enacted by Lord Kingsdown's Act (24 & 25 Vict. c. 114), first, that any will of personal estate made out of the United Kingdom by a British subject, wherever domiciled at the time of

(a) 10 H. L. C. 13; *Preston v. Melville*, 8 Cl. & F. 1.

(b) *Westlake*, § 326.

(c) *Bremer v. Freeman*, 10 Moo. P. C. 312; *Collier v. Rivas*, 2 Curt. 855.

(d) *Per Lord Penzance in In bonis Reid*, L. R. 1 P. & D. 74.

(e) *In re Rippon*, 32 L. J. P. & M. 141; *In bonis Reid*, L. R. 1 P. & D. 74.

making or of death, should be admitted to probate as valid, if it was executed in compliance with the forms prescribed either by the *lex loci actus*, the *lex domicilii* at the time of its execution, or the *lex domicilii originis* of the testator. Secondly, that any will of personal estate made within the United Kingdom by a British subject, whatever his domicil at either time, should be admitted to probate as valid, if it was executed in compliance with the forms required by the laws for the time being in force in that part of the kingdom where it was made (s. 2). And, thirdly, that no will or other testamentary instrument should be held to be revoked or to have become invalid, nor should the construction thereof be altered by reason of any subsequent change of domicil of the person making the same (s. 3). But it has been held that a will and revocation, executed according to the testator's domicil at the time of his death, revokes altogether a will made under a former English domicil, with the appointment of executors contained in it, if the intention that it should have that effect is apparent (a). This last section is not in terms confined to the wills of British subjects, but, having regard to the title of the Act ("An Act to amend the law with respect to wills of personal estate made by *British subjects*"), it is difficult to see how it could be extended to the wills of foreigners who should have acquired a British domicil between the time of making their will and that of their death. Assuming that the section cannot be so extended, the validity of such a will would have to be decided upon its compliance or non-compliance with the requirements of English law, and the fact that it was valid by the law of the testator's domicil at the time of making would be immaterial. With regard to the alternative tests of validity offered by the first two sections, it was decided by Lord Penzance (b) that only one can be adopted in each case, and that it is not competent for those who seek to set up a testamentary paper to

(a) *Cottrell v. Cottrell*, L. R. 2 P. & D. 400.

(b) *Pechell v. Hilderley*, L. R. 1 P. & D. 673.

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endeavour to secure the advantages of two conflicting jurisdictions. The privileges conferred by the Act attach to British subjects by naturalization (under 7 & 8 Vict. c. 66) as if they had been so by birth (a). As to the possible effect of marriage in England after the acquisition of an English domicil upon the validity of a will previously made, having regard to the provisions of the 3rd section: see *In the Goods of Reid* (b). And where the testator, being a naturalized Englishman, whose domicil was not ascertained, but appeared to be French, made in France a will and codicils in English form, and a holograph will confirming them in French form, it was held that all were valid under s. 1 of the Act, it being proved that the French law permitted foreigners in France to make their will according to the forms required by the law of their nationality; so that the French will was good directly, and the English will and codicils indirectly, by the *lex loci actus* (c).

**Capacity of
testator—
depends on
lex domicilii.**

The general rule that the law of the domicil governs testamentary dispositions of personalty applies to *capacity*; for although it has already been shewn (d) that the law of England regards the law of the place where an act is done, or a contract entered into, as the proper one to decide all questions of minority or majority, capacity or incapacity, this general rule does not apply to the execution of wills. It will be obvious that this is the natural consequence of the principle which prevents English Courts from assuming jurisdiction in respect of the will of a testator domiciled abroad, though the will may have been made in England. Of contracts and other acts to which the principle of domicil does not apply, the English Court assumes jurisdiction as being the *forum loci actus*, and decides questions of capacity by its own law as incidental to its jurisdiction. Where no act is done by the person whose capacity is in question to make the English Court

(a) *In the Goods of Gally*, L. R. 1 P. D. 438.

(b) L. R. 1 P. & D. 74.

(c) *In the Goods of Lacroix*, L. R. 2 P. D. 95.

(d) *Suprà*, p. 31.

the proper *forum*, the English law will not dispute the decision as to capacity of the *lex domicilii* (a).

With regard to *forms and solemnities*, the question of the proper law by which wills of personality should be tested was for some time left undecided, it having been thought at one period that there was a difference between the will of an English subject domiciled abroad and that of a foreigner similarly situated; and it was held in several cases that compliance with the English forms by an English subject was sufficient (b) and necessary (c). But this distinction was exploded, and the principle of referring to the decision of the *lex domicilii*, and of the *lex domicilii* alone, firmly established by subsequent decisions (d). The alteration made in the English law on this subject by Lord Kingsdown's Act (24 & 25 Vict. c. 114) has been already pointed out.

Further, by the law of the testator's domicil is meant not only the law of his domicil at the time of his death, but *the law at the time of his death* of his domicil at the time of his death. In *Lynch v. Provisional Government of Paraguay* (e), a domiciled Paraguayan died in Paraguay, leaving personal property in England. After his death all his property wherever situate became by a change in Paraguayan law the property of the nation of Paraguay, and his will became by the same law absolutely invalid. It was held, however, that the legatee under the will of the property in England was entitled to probate here notwithstanding, and that no retrospective operation could be attributed to the Paraguayan decree. "The question is," said Lord Penzance, "in what sense does the English law adopt the law of the domicil? Does it adopt the law of the domicil as it stands at the time of the death, or does it

Forms of wills
of movables.

(a) Story, Conflict of Laws, § 103; Westlake, Priv. Int. Law, § 401; *Re Hellmann's Will*, L. R. 2 Eq. 363.

(b) *Duchess of Kingston's Case*, cited 2 Addams. 21.

(c) *Curling v. Thornton*, 2 Addams. 21.

(d) *Stanley v. Bernes*, 3 Hagg. Eccl. 373; *Moore v. Darell*, 4 Hagg. Eccl. 346; *Price v. Dewhurst*, 4 My. & Cr. 76; *De Zichy Ferraris v. Hertford*, 4 Moo. P. C. 339; *Laneuville v. Anderson*, 2 Sw. & Tr. 24.

(e) L. R. 2 P. & D. 268.

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undertake to adopt and give effect to all retrospective changes that the legislative authority of the foreign country may make in that law? No authority has been cited for this latter proposition, and in principle it appears both inconvenient and unjust. Inconvenient, for letters of administration or probate might be granted in this country which this Court might afterwards be called upon, in conformity with the change of law in the foreign country, to revoke. Unjust, because those entitled to the succession might, before any change, have acted directly or indirectly upon the existing state of things, and find their interests seriously compromised by the altered law. As, therefore, I can find no warrant in authority or principle for a more extended proposition, I must hold myself limited to the adoption and application of this proposition, that the law of the place of domicil as it existed at the time of the death ought to regulate the succession to the deceased in this case." The rule which refers all questions of the validity of a will to the law of the testator's domicil applies not only to the formal requisites of execution, but to all objections which could be raised in the Court of the domicil. Where the will of the testatrix had been duly proved in Jersey, where she was domiciled, it was not allowed to be impeached in the Court of Probate here on the ground that the testatrix was of unsound mind or that it was obtained by undue influence (a).

Testamentary
powers of
appointment
by will.

Where a power of appointment by will to personalty has been given under English law, and a will is made in pursuance of the power appointing to personalty situate in England, in conformity with the English law, but not with the law of the testator's domicil, the English Court of Probate, according to the latest decisions, will accept the will and grant probate of it (b). The question, however, can hardly be said to be in a satisfactory condition. According to *Tatnall v. Hankey* (c), it is the English Court of Probate

(a) *Miller v. James*, L. R. 3 P. & D. 4.

(b) *In the Goods of Hallyburton*, L. R. 1 P. & D. 90; *In the Goods of Alexander*, 29 L. J. P. & M. 93.

(c) 2 Moo. P. C. 342.

which in such a case must pronounce upon the testamentary character of the alleged will. It does not clearly appear by what law it is to guide itself in so doing, though Story (*a*), and apparently Westlake (*b*), assumes that English law is meant. Lord Penzance, however, appeared to consider that according to this case, and the later one of *Barnes v. Vincent* (*c*), it was the duty of the Court to inquire, where the English law was applicable, whether the will was executed according to the Wills Act, and where the law of a foreign country was applicable, whether it was executed according to the law of the domicil or foreign country (*d*). The cases cited appear to be direct authorities that the terms of the power in such cases are not to be looked at by the English Court of Probate, and so Lord Penzance considered them, but nevertheless felt himself compelled, on the later authority of Sir C. Cresswell in the case of *In the Goods of Alexander* (*e*), to come to a decision directly opposed to them, expressing at the same time a preference for the rule of the law of the domicil in such cases, which had been previously approved of by Sir C. Cresswell himself in the case of *Crookenden v. Fuller* (*f*). Probate will therefore be granted in such cases if the will be executed in conformity with the power, without reference to the requirements of the law of the testator's domicil. As to the effect of such grant of probate, Mr. Farwell says in his note to *Tatnall v. Hankey* that it would conclude anyone from objecting in the Court of Chancery that the instrument proved was not the will of the testator, citing *D'Huart v. Harkness* (34 B. 324), *Dolphin v. Robins* (7 H. L. C. 390), and calling attention to the effect of Lord Kingsdown's Act upon such cases for the future. In the case of *In the Goods of Hallyburton*, the will having been made in Scotland according to the English form, and being invalid by the Scotch law, which

(*a*) Conflict of Laws, § 473 a.

(*b*) Priv. Int. Law, § 327.

(*c*) 5 Moo. P. C. 201.

(*d*) *In the Goods of Hallyburton*, L. R. 1 P. & D. p. 93.

(*e*) 29 L. J. P. & M. 93.

(*f*) 29 L. J. P. & M. 1; 1 Sw. & Tr. 454.

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was that of the domicil of the testatrix, was not affected by the second section of Lord Kingsdown's Act (24 & 25 Vict. c. 114, s. 2). According to *D'Huart v. Harkness* (a) a power given by will to appoint to personality "by a will duly executed" is well exercised by a will good according to the law of the country of the testator's domicil, though ill executed according to the law of the country where the personality is situated, and where the original testator was domiciled. Probate had been granted in England to the will which purported to appoint. Lord Romilly said in that case "The power must be exercised by a will valid according to the law of England; but the law of England admits the validity of two classes of wills, namely, wills executed in accordance with the English statute, and wills of persons domiciled abroad executed according to the law of their domicil; and wills of the latter class effectually dispose of personal property in England. The cases which have been cited decide that such powers as these may be exercised by wills of the former class, although the testator dies domiciled abroad, but there is no decision that they may not also be exercised by wills of the latter class. On the contrary, the law takes a broad view, and allows the execution of such powers by a will which is executed in conformity either with the law of England or with the law of the testator's domicil" (b). The cases cited to which Lord Romilly referred were *Tatnall v. Hankey* and *In the Goods of Alexander* (c), and his view of the law as there laid down has been since confirmed, as already mentioned, by Lord Penzance in *In the Goods of Hallyburton* (d); but Lord Penzance's criticisms on the principle he felt compelled to follow would detract from the weight of the authority in a Court of Appeal. Where an instrument was executed purporting to be in exercise of a power of appointment by will, and the Ecclesiastical Court, in 1834, determined that it was a valid will, and admitted it to pro-

(a) 34 L. J. Ch. 311.

(b) *D'Huart v. Harkness*, 34 L. J. Ch. 311, 313.

(c) 2 Moo. P. C. 342; 29 L. J. P. & M. 93.

(d) L. R. 1 P. & D. 90.

bate, Sir John Leach, in a suit in Chancery involving the same question, though not strictly between the same parties, held that the validity of the instrument as a will could not be contested (*a*). The judgment recognised was of course the judgment of a Court created by the same sovereign jurisdiction; but the principles of international law would seem to require a similar recognition, at any rate in suits between parties or privies, if the tribunal which pronounced upon the will had been a foreign Court, in the country where the deceased was domiciled (*b*).

As to the *interpretation and construction* of wills of personal estate, there is no doubt at all but that the law of the ^{of wills of} _{movables.} *domicil* speaks alone (*c*), unless there is sufficient on the face of the will to shew a different intention in the testator, and this not only in the *forum domicilii* but wherever such questions arise (*d*). In *Enohin v. Wylie*, Lord Westbury says, "All questions of testacy and intestacy belong to the judge of the *domicil*. To the Court of the *domicil* belongs the interpretation and construction of the will of the testator" (*e*). Where a testator domiciled in England devised personality in trust for A. for life, remainder to his children at the age of twenty-one, and A. acquired a French *domicil*, and became the father of a daughter legitimate by French but not by English law, it was held by Lord Hatherley that the word "children" was to be construed according to the law of England, and that A.'s daughter took nothing under the will (*f*). In his judgment Lord Hatherley said, "The will must be construed according to the law of the testator's *domicil*. That is a proposition for which I need refer to no authorities . . . When the testator speaks of the children of his nephew, he does so *simpliciter*, and he must mean such

(*a*) *Douglas v. Cooper*, 3 My. & K. 378.

(*b*) See *infra*, Chap. XI.

(*c*) *Yates v. Thompson*, 3 Cl. & F.; *Enohin v. Wylie*, 10 H. L. C. 1; *Anstruther v. Chalmer*, 2 Sim. 1.

(*d*) *Trotter v. Trotter*, 4 Bligh. N. S. 502; 3 Wilts. & S. 407.

(*e*) 10 H. L. C. 13.

(*f*) *Boyes v. Bedale*, 1 H. & M. 798; *Goodman v. Goodman*, 3 Giff. 643.

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persons as the law of England would regard as the nephew's children. The testator cannot be assumed to know that there is any other kind of child extant" (a). *Re Wright's Trusts* (b), which had come before the same judge some years previously, was decided upon a different ground, as it was there held that by neither of the conflicting laws—i.e., the law of the domicil of the testator and the law of the domicil of the claimant—was the child legitimate, and it was therefore unnecessary to say whether or not the law which was entitled to construe the will was paramount. In *Anstruther v. Chalmer* (c), a Scotch lady died domiciled in England, having made a will in the Scotch form whilst on a visit to Scotland. The universal legatee having died in the lifetime of the testatrix, his representative became entitled by Scotch law. It was held however that the law of England must govern the construction, and that the gift consequently lapsed. Similarly technical expressions or words of quantity or value in a will are to be interpreted as they would be in the Courts of the testator's domicil. The cases on this part of the subject are so fully discussed in Story, that it is unnecessary to do more than refer to them here (d).

Testator's intention to evade *lex domicili*.

As the law of the testator's domicil, when left to itself, will decide all questions connected with the construction and effect of his will that were not expressly contemplated, so any attempt by the testator himself to evade the provisions of that law will be futile. Thus, in *Hog v. Lashley* (e), it was held that though the personalty referred

(a) So in *Skottowe v. Young*, L. R. 11 Eq. 474, the children of a testator domiciled in France, who had been legitimated *per subsequens matrimonium* according to French law, were held liable to pay legacy duty only at the rate fixed by the Legacy Duty Acts for legitimate children.

(b) 2 K. & J. 595.

(c) 2 Sim. 1; see *Yates v. Thompson*, 3 Cl. & F. 544, 569; *Omaney v. Bingham*, 3 Hagg. Eccl. 414, n.

(d) *Pierson v. Garnett*, 2 Bro. Ch. 38; *Malcolm v. Martin*, 3 Bro. Ch. 50; *Saunders v. Drake*, 2 Atk. 465; *Wallis v. Brightwell*, 2 P. Wms. 88; *Lansdown v. Lansdown*, 2 Bligh. 60; *Laneuville v. Anderson*, 2 Sw. & Tr. 24; *Stewart v. Garnett*, 3 Sim. 398. As to the practice of the Court of Chancery in ignoring the rate of exchange, see *Cockerell v. Barber*, 16 Ves. 461; *Campbell v. Graham*, 1 Russ. & My. 453.

(e) 6 Bro. P. C. 577; 3 Hagg. Eccl. 415.

to by the will was locally situate in England, a Scotch testator could not exclude his children from the *legitim* or share in it given imperatively by the Scotch law. Similarly, in *Ommaney v. Bingham* (*a*), the law of the testator's domicil was referred to in order to decide whether or not a condition in restraint of marriage, with a bequest over, was void.

A question has often arisen as to what wills are entitled Foreign wills, to probate in the English Court, and it appears to be now settled that a will disposing solely of property situate abroad will not be admitted to probate here, unless it is incorporated by reference in another will entitled to probate on its own account, as disposing of property within this jurisdiction (*b*). Unless so incorporated, it is not entitled to probate here (*c*). But it seems that a mere mention in the English will of an intention to ratify and confirm the foreign one will be sufficient to incorporate it, so as to entitle it to probate (*d*). And where a testator expressed a distinct intention, in a will disposing of British property, that it should be regarded as independent of and disconnected from his general will, which disposed of other property in America at much greater length, Sir J. Hannen allowed the English will to be admitted to probate alone, an authenticated copy of the American will and codicils being ordered to be filed in the registry, and a note of such filing appended to the English probate (*e*).

A foreign grant of probate granted by the competent Court, i.e., the Court of the domicil of the deceased, will be followed by the English Court of Probate when application is made for a grant of probate or administration with the will annexed here. (*f*). In the case of *In the Goods of Earl* (*f*) the person who had obtained probate as executrix

Foreign grant
of probate
followed by
English
Court.

(*a*) 5 Ves. 757; 3 Hagg. Eccl. 414.

(*b*) *In the Goods of Lord Howden*, 43 L. J. P. & M. 27.

(*c*) *In the Goods of Cood*, L. R. 1 P. & D. 449.

(*d*) *In the Goods of Harris*, L. R. 2 P. & D. 83; 39 L. J. P. & M. 48; *In the Goods of De la Saussaye*, L. R. 3 P. & D. 43; 42 L. J. P. & M. 47.

(*e*) *In the Goods of Astor*, L. R. 1 P. D. 150.

(*f*) *In the Goods of Earl*, L. R. 1 P. & D. 450; *In the Goods of Hill*, L. R. 2 P. & D. 89; *infra*, p. 200.

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from the Court of the domicil in New South Wales was not entitled to the grant here, but the Court granted her administration with the will annexed, under the discretionary power conferred upon it by 20 & 21 Vict. c. 77, s. 73. Lord Penzance, in reviewing the previous decisions on the subject, said, "The result of the cases (a) is that in the Prerogative Court the tendency was to follow the foreign grant where it could be done, but there was a reluctance to lay down any general rule on the matter; while the decisions in the Court of Probate have militated against the rule of following the foreign grant." Lord Penzance, after having referred to the *dicta* of Lord Westbury on the subject in *Enohin v. Wylie* (b), proceeded to say that he thought the Court ought to act upon the special power given to it by 20 & 21 Vict. c. 77, s. 73, and make a grant in all such cases to the person who had been clothed by the Court of the country of domicil with the power and duty of administering the estate, no matter who he was or on what ground he had been clothed with that power. The same principle was adopted in the case of *In the Goods of Hill* (c), where administration *de bonis* had been granted in America to those who applied for a similar grant here, the testatrix having died domiciled in America, and there being personal estate unadministered in this country.

**Succession to
movables *ab
intestato*—
governed by
lex domicilii.**

(b.) *Succession to Movable Personal Property by operation of Law.*—It will have been already gathered from what has been said as to the law which governs the disposition of personal chattels by will, that the same principle of the *lex domicilii* applies to succession to personal chattels *ab intestato*. The words of Lord Westbury, cited above (d), in *Enohin v. Wylie* (e), are as applicable to cases of succession *ab intestato* as to those of testacy. "It is now put

(a) *Larpent v. Sindry*, 1 Hagg. Eccl. 383; *In the Goods of Read*, 1 Hagg. Eccl. 476; *Countess D'Acunha's Case*, 1 Hagg. Eccl. 287; *Duchess of Orleans Case*, 1 Sw. & Tr. 253; 28 L. J. P. & M. 129; *Vicca v. D'Aramburn*, 2 Curt. 280; *In the Goods of Stewart*, 1 Curt. 904; *In the Goods of Rogerson*, 2 Curt. 656.

(b) 10 H. L. C. 115.

(c) L. R. 2 P. & D. 89; so *In the Goods of Smith*, 16 W. R. 1130.

(d) *Suprà*, p. 183.

(e) 10 H. L. C. 13.

beyond all possibility of question that the administration of the estate of a deceased person belongs to the Court of the country where the deceased was domiciled at the time of his death. All questions of testacy and intestacy belong to the judge of the domicil. To determine who are the next of kin or heirs of the personal estate of the testator is the prerogative of the judge of the domicil. In short, the Court of the domicil is the *forum concursus*, to which the legatees under the will of a testator, or the parties entitled to distribution of the estate of an intestate, are required to resort." The result of the cases previous to 1801 was stated in that year by Sir R. Arden, M.R., as being to the same effect. "The first rule is, that the succession to the personal estate of an intestate is to be regulated by the law of the country of which he was a domiciled inhabitant at the time of his death; without any regard whatsoever to the place either of the birth or the death, or the situation of the property at that time" (a). Thus, it is clear that the law of the domicil is the proper law to decide who are the persons entitled to administration, or succeed to personal chattels *ab intestato*.

In *Doglioni v. Crispin* (b) the intestate died domiciled in Portugal, and the Portuguese Court had decided upon the question of his rank in that country, finding that he was a *pion* or plebeian, to whose succession on intestacy his natural son was entitled to succeed. By this judgment the House of Lords held that the English Courts were bound. So where the Court of the domicil at the time of death grants administration to one who by the law of that country is entitled to the grant, the English Court, in making a grant of administration as to property situate

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Persons
entitled to
succeed on
intestacy.

(a) In *Somerville v. Somerville*, 5 Ves. 786. Other authorities to the same effect on the general question are: *Pipon v. Pipon*, Ambl. 25; *Thorne v. Watkins*, 2 Ves. 35; *Sill v. Worswick*, 1 H. Bl. 690; *Balfour v. Scott*, 6 Bro. P. C. 550; *Bruce v. Bruce*, 2 B. & P. 229, n.; *Hunter v. Potta*, 4 T. R. 182; *Potter v. Brown*, 5 East, 130; *Thornton v. Curling*, 8 Sim. 310; *Price v. Dechurst*, 8 Sim. 279; and among the more recent cases, *Doglioni v. Crispin*, L. R. 1 H. L. 301; *In the Goods of Weaver*, 36 L. J. P. & M. 41.

(b) L. R. 1 H. L. 301.

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in England, will follow the foreign grant (*a*). And the law of the domicil will prevail as to what is sufficient to constitute kinship; so that where the intestate died domiciled in England, leaving debts and choses in action recoverable in Scotland, the English rule as to kindred by half blood, and not the Scotch, was followed (*b*). So legitimacy is to be decided by the same law; and where an intestate dies domiciled in England, no person can share in his personality, either directly or by representation, who is not legitimate by English law (*c*). The converse case arose in *Skottowe v. Young* (*d*), where the proceeds of land devised by a British subject domiciled in France, on trust to sell and pay the proceeds to his daughters born of a French mother before marriage, but afterwards legitimated according to French law, were held liable to legacy duty at £1 per cent. only, that being the rate fixed by the Legacy Duty Act for legacies to the testator's legitimate children. The distinction between cases of distribution on intestacy, which are to be governed by the law of the intestate's domicil, and those in which the real question is how far the operation of the *lex situs* on his real property shall prevail, is well seen in two cases cited by Sir W. Grant in *Brodie v. Barry* (*e*). In the first the intestate's domicil was English, and it was accordingly held that the next of kin took his personality by English law, so that the Scotch heir was not obliged to bring the Scotch realty into hotchpot, in order to claim his share, as the Scotch law would have compelled him to do (*f*). In the other case, where the domicil was also English, it was held that the personality was not liable to be called upon to exonerate Scotch real estates from debts to which it alone was liable by Scotch law, although the English law would have imposed such a burden upon

(*a*) *In the Goods of Weaver*, 36 L. J. P. & M. 41; *In the Goods of Hill*, L. R. 2 P. & D. 89; *Burr v. Cole*, Ambl. 416.

(*b*) *Thorne v. Watkins*, 2 Ves. Sen. 35.

(*c*) Per Lord Hatherley in *Boyes v. Bedale*, 1 H. & M. 805.

(*d*) L. R. 11 Eq. 474; see *Wallace v. Attorney-General*, L. R. 1 Ch. I at p. 8.

(*e*) 2 Ves. & B. 131.

(*f*) *Balfour v. Scott*, 6 Bro. P. C. 550.

English land (*a*). Obviously this decision does not touch the claim of the *lex domicilii* to govern all questions that affect the personality only, and in accordance with this general principle, it was held in *Hog v. Lashley* (*b*) that a Scotch testator could not exclude his children from the *legitim* or share in his personality given to them by the Scotch law, though the property was situate in England. In *Ommaney v. Bingham* (*c*) it was decided that the law of the testator's domicil determined whether or not a condition in restraint of marriage with a bequest over was void. These two last cases properly come under the head of succession to personal property by will; but the principles regulating the two branches of the subject are almost identical, and they are virtually authorities for the general principle, that the rights and liabilities of those entitled to succeed to the movable personality of a deceased person are governed by the law of his domicil. The duties of executors and administrators will be considered immediately.

(c.) *Right and Title of the Personal Representative.*— Title of foreign ex-ecutor or ad-ministrator.

Closely connected with the subject of succession to personal chattels either by will or *ab intestato*, come the principles by which these personal chattels are collected and made available for the purposes of succession, after clearing the estate of the deceased from all burdens and claims. In cases where all the personal chattels of the deceased are in one country, and that country the country of his domicil, no difficulty arises; and the personal representative who is appointed by the domiciliary Court either to execute the will or to administer the estate, as the case may be, takes possession of all the estate of the deceased by the authority of the Court which appointed him, and deals with it in accordance with the law which that Court enforces. But in many cases it happens that the personal estate of the deceased is not situate in the country of

(a) *Drummond v. Drummond*, 6 Bro. P. C. 601.

(b) 6 Bro. P. C. 577; 3 Hagg. Eccl. 415.

(c) 5 Ves. 757; 3 Hagg. Eccl. 414.

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Grant of probate or administration—no extra-territorial effect.

Foreign representative—no right to sue.

his domicil, or not wholly so situate; and it is plain, first, that some other authority than that of the Court of the domicil is necessary to enable any representative of the deceased to take possession of it; and secondly, that there will be in many cases a conflict of law as to the principles by which he should be guided in dealing with it.

The first general principle which can be laid down on the subject is that a foreign grant of probate or letters of administration is intra-territorial only in its operation, and that the title so conferred extends only as of right to personal estate within the jurisdiction of the government which granted it (a). Consequently to entitle the personal representative of a man who has died abroad to take possession of personal estate here, he must prove the will or take out letters of administration here as well as in the country of the domicil (b). This rule extends to choses in action, it being an established rule (c) that in order to sue in any court of this country in respect of the personal rights or property of a deceased person, the plaintiff must appear to have obtained probate or letters of administration in the Court of Probate of this country. Thus, where a company is being wound up in an English Court no personal representative of a creditor can establish his debt without an English probate or letters of administration, though the deceased creditor was domiciled abroad (d). Even a stop-order cannot be obtained without complying with this requisite (e). But an English grant of probate or administration properly obtained here is by the English Courts regarded as extending to all the personal property of the deceased, wherever situate at the time of his

(a) Story, § 512.

(b) *Lee v. Moore*, Palm. 163; *Tourton v. Flower*, 3 P. Wms. 369; *Vauthienen v. Vauthienen*, Fitzgib. 204; *Le Briton v. Le Quesne*, 2 Cas. temp. Lee, 261; *Attorney-General v. Bouwens*, 4 M. & W. 193.

(c) Williams on Executors, i. 862; *Attorney-General v. Bouwens*, 4 M. & W. 193; *Tyler v. Bell*, 2 My. & Cr. 89; *Attorney-General v. Cockerell*, 1 Price, 179; *Whyte v. Rose*, 3 Q. B. 507; *Enohin v. Wylic*, 10 H. L. C. 19; *Macmahon v. Rawlings*, 16 Sim. 429; *Carter v. Crofts*, Godb. 33.

(d) *Partington v. Attorney-General*, L. B. 4 H. L. 100.

(e) *Christian v. Devereux*, 12 Sim. 264.

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death (*a*), at least in such a sense that a representative duly constituted in England may sue in England in relation to foreign assets; and in a case before Sir J. Nicholl (*b*), where a domiciled Englishman died in France, leaving two testamentary papers relating to personalty there, and the first of them also to personalty and realty in England, his widow was granted administration with both papers annexed, though a doubt was expressed whether and in what sense such administration extended to the French property. This case was followed by Sir C. Cresswell in *In the Goods of Winter* (*c*), but the true rule on the point, as has been already stated, was laid down in the later cases cited above (*d*); and now it may be taken that a will disposing solely of property situate abroad will not be admitted to probate here unless it is incorporated by reference in another will entitled to probate here as disposing of property within the jurisdiction; though a mere mention in the English will of an intention to ratify and confirm the other will be sufficient. To support a right of action, however, a grant of representation or probate in England is only necessary where the plaintiff is suing *quà* personal representative, in the right of the deceased (*e*). Thus, where a foreign administrator has already obtained a judgment abroad against an English debtor of his intestate, he may prove in England against the estate of that debtor, if since dead, without taking out English administration to his own intestate (*f*). And in granting probate to the executor Foreign grant
of probate
followed by
English Court.
g. of a person who has died domiciled abroad, it is the duty of the Court of Probate, in accordance with the comity of nations, to follow the grant (if any) made by the competent Court of the domicil (*g*). In accordance with this prin-

(*a*) *Whyte v. Rose*, 3 Q. B. 498, 507; *Scarth v. Bishop of London*, 1 Hagg. Eccl. 625.

(*b*) *Spratt v. Harris*, 4 Hagg. Eccl. 405, 409.

(*c*) 30 L. J. P. & M. 56.

(*d*) *In the Goods of Lord Howden*, 43 L. J. P. & M. 27; *In the Goods of Coode*, L. R. 1 P. & D. 449; *In the Goods of Harris*, L. R. 2 P. & D. 83; 39 L. J. P. & M. 48; *In the Goods of De la Saussaye*, L. R. 3 P. & D. 43; 42 L. J. P. & M. 47.

(*e*) *Vanquelin v. Bouard*, 15 C. B. N.S. 341.

(*f*) *Macnichol v. Macnichol*, L. R. 19 Eq. 81.

(*g*) *Enohin v. Wylie*, 10 H. L. C. 1, 14; *ante*, p. 193.

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ciple, it has been the practice, upon the production of an exemplified or certified copy of the probate granted by the proper Court of the domicil, for the English Court to make its own grant of probate to the executor who proved there (a). And the doubt expressed as to the expediency of the practice by Sir J. Nicholl in *Larpent v. Sindry* and *In the Goods of Read* (b) must now be regarded as set at rest by the judgments of Lord Westbury and Lord Cranworth in *Enohin v. Wylie*. So where the Court of the domicil has decreed that the time limited by its law for the execution of the executorship has passed, and that the executor has no more right to intermeddle in the estate of the testator as against the persons beneficially interested, the Court held itself bound by such decree, and refused to grant probate as to English personalty to such executor (c). Similarly in granting ancillary administration, the Court will follow a grant already made in the Court of the domicil, and in granting original administration, will guide itself by the law of that Court (d). But in *In the Goods of Cosnaham* (e), Lord Penzance said that the Court would not follow a foreign grant so as to treat the claimant as executor to the tenor of a will, where he did not appear to it to be entitled to such a grant, but admitted that the foreign grant should be followed so far as to treat the deed as testamentary, and eventually granted the claimant administration with the will annexed under the discretionary power given by 20 & 21 Vict. c. 77, s. 73. In a later case, the same judge used language not quite consistent with this decision, saying, "I have before acted on the general principle that where the Court of the country of the domicil of the deceased makes a grant to a party, who

(a) *In the Goods of Clarke*, 36 L. J. P. & M. 72; *Larpent v. Sindry*, 1 Hagg. 382; *In the Goods of Cringan*, 1 Hagg. 549; *In the Goods of Rioboo*, 2 Add. 461; *Viesca v. D'Aramburn*, 2 Curt. 277; *In the Goods of Henderson*, 2 Robert. 144; *In the Goods of Smith*, 2 Robert. 832.

(b) 1 Hagg. 474.

(c) *Laneuville v. Anderson*, 2 Sw. & Tr. 24; see *Crispin v. Doglioni*, 3 Sw. & Tr. 96; S.C. L. R. 3 H. L. 301.

(d) Williams on Executors, i. 430; *Enohin v. Wylie*, 10 H. L. C. I, and cases cited in note (a).

(e) L. R. 1 P. & D. 183.

then comes to this Court and satisfies it that by the proper authority of his own country, he has been authorized to administer the estate of the deceased, I ought, without further consideration, to grant power to that person to administer the English assets" (a).

In the case of *In the Goods of Weaver* (b), the principle of following a foreign grant of administration was recognised, but the Court refused to extend it so far as to follow a grant made to a nominee of the person entitled, except upon the express consent of the latter, there being nothing to shew that the consent given to the appointment of the nominee, as to the goods in the country of the domicil, was intended to apply also to goods situate here. As to the evidence required by the English Court of the will upon which foreign probate has been granted, a translation of the will proved in the foreign Court should be adduced; and where the document used in that foreign Court was itself a translation from an English original, a re-translation of that translation is the proper document to produce; though it is, of course, open to those seeking English probate to claim it on the ground that the will is valid by the law of the foreign domicil, without reference to the foreign decree, in which case the original English will, or a copy of it, should be used (c). In the words of Hannen, J., "If this Court is to give credit to a foreign Court for having duly investigated all the facts of a case upon which it finds its decree, it must also assume that it has satisfied itself of the accuracy of the document upon which it proceeds" (d).

Under 24 & 25 Vict. c. 121, when subjects of foreign States shall die in Her Majesty's dominions, and there shall be no person to administer their estates, the consuls of such foreign States shall administer, and shall be entitled to obtain from the proper Court letters of administration

(a) *In the Goods of Hill*, L. R. 2 P. & D. 89.

(b) 36 L. J. P. & M. 41.

(c) *In the Goods of Deshais* and *In the Goods of Vigny*, 4 Sw. & Tr. 15.

(d) *In the Goods of Rule*, Weekly Notes, Feb. 9, 1878, p. 32. See also *In the Goods of Clarke*, 36 L. J. P. & M. 72.

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Foreign ad-
ministrators
—cannot
transfer their
title.

of the effects of such deceased person, limited in such manner and for such time as the Court shall think fit. These provisions, however, are only to apply to the subjects of such foreign States as shall be specified by order in Council, with whom agreement shall have been made by treaty for securing similar rights to British subjects and British consuls within their dominions. Apart from this statute, the law of this country will not, it seems, recognise the right of a foreign consul to take possession of or administer the property of a foreigner dying here, who is domiciled in his own country, even though none of those otherwise entitled object to the grant (a). When a grant of administration has been once made, the person who has received it is the person bound to administer the effects of the deceased within the jurisdiction, and it makes no difference that he may have consented to the appointment of another representative in the Court of the domicil. Thus in *Preston v. Melville* (b), the persons named as trustees and executors in the will of a domiciled Scotchman having declined to act, his next of kin obtained letters of administration of his personal estate in England from the proper Court there, and afterwards consented to the appointment, by the Court of Session in Scotland, of other persons as trustees and executors in the place of those named in the will, with all the powers that had been thereby given to them. These trustees so appointed raised an action in the Court of Session against the administratrix, calling on her to transfer to them the personal estate possessed by her under the administration, and offering her a full release from liability. The House of Lords held that the English administratrix was the proper person to administer the personal estate in England, by virtue of the letters of administration, and that the Scotch Court could give no title to such estate. But if the substituted trustees had been appointed executors in Scotland before

(a) *Aspinwall v. Queen's Proctor*, 2 Curt. 241, 247; *In the Goods of Wyckoff*, 3 Sw. & Tr. 20; Williams on Executors, i. 430, n.

(b) 8 Cl. & F. 1.

the next of kin took out administration in England, and with her consent, there can be little doubt that the English Court would have held them entitled to administration here in preference to her claim as next of kin. Their appointment would then have been sanctioned by the Court of the domicil—the appointment being, of course, the act of the Scotch Court—and the next of kin would have been no longer entitled by the law of the domicil at the time the application was made to the English Court, so that the observations of Lord Cranworth in *Enohin v. Wylie* (a) would apply.

The grant of administration once having been made, <sup>Title of administrator
—to what
effects it
extends.</sup> the title of the administrator to all the effects within the jurisdiction becomes complete, and remains though they be carried out of it; unless they come into another jurisdiction as unappropriated assets of the deceased. Thus where the widow of an intestate in India took out administration of his effects there, and remitted the proceeds of those effects in government bills to her agent in England, and a creditor of the intestate, having taken out administration in this country, brought an action against that agent to recover such proceeds, it was held that no action would lie (b). But in *Hervey v. Fitzpatrick* (c), Lord Hatherley held that where a foreign administrator had remitted assets to England and come himself after them, he might be sued in a Court of Equity by the next of kin who had taken out English administration, in respect of those assets. The decision, however, was put on the ground that the foreign administrator had transmitted the assets to England for the purpose of their being carried to the account of the estate of the deceased owner, and the Court refused to order the defendant to pay the proceeds of the assets in question into Court. This was in effect the same principle as that adopted by Sir J. Leach in *Logan v. Fairlie* (d), who says, "If a testator die in India,

(a) 10 H. L. C. 1.

(b) *Currie v. Birches*, 1 Dow & Ry. 35; *Jauncey v. Seeley*, 1 Vern. 397.

(c) Kay, 421.

(d) 2 Sim. & Stu. 284.

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and his personal estate be wholly in India, and his executor be resident there, and the will be proved there, and the executor remit to a legatee in England, I am of opinion that the legacy duty is not payable upon such remittance, inasmuch as the whole estate is administered in India, and the remittance is in respect of a demand, which is to be considered as established there. But if a part of the assets of the testator is found in England, *in the hands of the agent of such executor, without any specific appropriation, and a legatee in England institute a suit here for the payment of his legacy out of such unappropriated assets, then such assets are to be considered as administered in England.*" And though the decision of Sir J. Leach in this case as to the liability of such assets to legacy duty was subsequently reversed (*a*), on the authority of *Attorney-General v. Jackson* (*b*), which will be noticed when the rules as to the payment of legacy, succession, and probate duties are discussed, yet the above statement of the law as to specific appropriation of assets by an administrator was quoted with approval by the Court. When, therefore, proceedings are commenced in England as to unappropriated assets within the jurisdiction, administration should be taken out in England, and the administrator made a party to the suit (*c*). So where it did not even appear that the intestate, who died in India, had at the time of his death assets in England, but a bill was brought here for an account of the assets in the hands of his personal representative in India, it was held that administration must be taken out in England, and the administrator made a party (*d*).

Scotch con-
firmations.

With regard to the effect of Scotch probates or "confirmations," as they are called, in England, it is enacted by 21 & 22 Vict. c. 56, s. 12, that when any confirmation of the executor of a person who shall in manner aforesaid be found to have died domiciled in Scotland, which in-

(*a*) *Logan v. Fairlie*, 2 My. & Cr. 59.

(*b*) 2 Cl. & F. 48.

(*c*) *Williams on Executors*, i. 361.

(*d*) *Tyler v. Bell*, 2 My. & Cr. 89; *Bond v. Graham*, 1 Hare, 482; *Flood v. Patterson*, 29 Beav. 295.

cludes besides the personal estate situate in Scotland also personal estate situate in England, shall be produced in the principal Court of Probate in England, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the commissary, finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and effect in England as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate. Under this section, when the seal of the English Court has been affixed, the executor has all the powers of an English executor, and may sell and dispose of English leaseholds, although specifically bequeathed, though a Scotch executor cannot deal with leaseholds in Scotland (*a*). And the enactment incorporates with it 48 Geo. 3, c. 149, so that where additional property is discovered in this country after sealing the confirmation, an additional confirmation may be issued in Scotland, and the seal of the English Court affixed to that (*b*). But when one confirmation has been sealed in England, the Court will not allow its seal to be further affixed to an "eik" or additional confirmation; and this whether the additional confirmation include a part of the estate omitted from the original one or not (*c*). A similar enactment is made as to Irish probates by 20 & 21 Vict. c. 95.

Though it is thus clear that no man has any right to assume title to the assets of a deceased person, except by virtue of probate or letters of administration taken out in the country where they are situate, yet a question has sometimes arisen as to what is the position of a foreign personal representative who has done so, and how far payments to him by debtors of the deceased are a good

Foreign representative
acting as
executor de
son tort.

(*a*) *Hood v. Barrington*, L. R. 6 Eq. 218.

(*b*) *In the Goods of Ryde*, L. R. 2 P. & D. 86. See also on this section *Hawarden v. Dunlop*, 2 Sw. & Tr. 340; *Williams on Executors*, i. 363.

(*c*) *In the Goods of Hutchesson*, 32 L. J. P. & A. 167; *In the Goods of Gordon*, 2 Sw. & Tr. 622; *In the Goods of Wingate*, ib. 625.

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discharge to them of their liabilities. Such a person intermeddling with English assets would, it is clear, be regarded as executor *de son tort*, the commonly accepted definition of such an executor being "he who takes upon himself the office of executor by intrusion, not being so constituted by the deceased, nor, for want of such constitution, substituted by the Court to administer" (a); and as such an executor has all the liabilities, though none of the privileges, that belong to the character of executor (b), it is clear that he would be liable to actions in the country where the assets were found situate, as the representative of the deceased, at least, as far as the amount of those assets. Unless a foreign personal representative has received English assets, so as to make himself liable in England on this principle, or has taken out administration here, he is of course not liable to be sued, *qua* representative, in English Courts, however unlimited his foreign liability may be (c). But whatever liability might attach to such an executor *de son tort*, would his receipt be a good discharge to debtors of the deceased's estate, so as to protect them from any further demand of the same debt at the hands of a representative properly constituted? It was laid down in *Coulter's Case* (d) that "all lawful acts which an executor *de son tort* doth are good;" and it has been held that alienations of the goods of the deceased by such an executor are indefeasible (e). These authorities, however, by no means go so far as to sanction the collection of assets by such an executor, or to protect those who have made payments to him without satisfying themselves that he has authority to give them a discharge. Story inclines to the opinion that such discharge would be invalid, on the ground that receiving debts amounts to a collection of assets, which no

(a) *Godolphin*, pt. 2, c. 8, s. 1; *Wentworth*, Ex. c. 14, p. 320 (ed. 14); *Swinburne*, 4. 23, i.

(b) *Per Lord Cottenham in Carmichael v. Carmichael*, 2 *Phill.* 101.

(c) *Beavan v. Lord Hastings*, 2 *K. & J.* 724.

(d) 5 *Co.* 30 b.

(e) *Greysbrook v. Fox*, *Plowd.* 282; *Parker v. Kett*, 1 *Raym.* 661; S.C. 12 *Mod.* 471.

man is empowered to do except by a grant of probate or administration in the country where he finds them (a). It is clear that a foreign personal representative would have no advantage in this respect over a common executor *de son tort* (b).

According to the old case of *Daniel v. Lucre* (c), a release given by an Irish administrator to the Irish obligee of a bond made in England, and afterwards taken possession of in England by the English administratrix, the intestate having died there, was held to be no answer to an action on the bond in England by the English administratrix, on the express ground that bonds are *bona notabilia* in the diocese where they are found at the time of death (d). It is difficult to regard the *situs* of such a bond as the real locality of the assets represented by it, in preference to the country where the debtor must be sued, and in *Whyte v. Rose* (e), where the circumstances of *Daniel v. Lucre* were reversed, it was held that a grant of administration in the foreign country where the bond was situate was not necessary to entitle an English administrator to sue in England, the debtor having come within the jurisdiction of the English Court. There can be no doubt that if a release had been given by a person who had obtained administration in the foreign country where the bond was *bonum notabile* at the time of the death, that release would have been a good answer to a subsequent action by any administrator in any other country, whether that of the domicil or not (f); but there is no English authority to shew that where a debtor to the estate of the deceased has paid a personal representative who could not have enforced the claim against him

(a) Story, § 514; *Preston v. Melville*, 8 Cl. & F. 1, 12; *Attorney-General v. Bouwens*, 4 M. & W. 71.

(b) *Partington v. Attorney-General*, L. R. 4 H. L. 100.

(c) *Dyer*, 303; *Dal*. 76.

(d) *Trowbridge v. Taylor*, temp. Jas. I. cited *Dyer*, 305; 11 *Vin. Ab.* 79; 1 *Rol. Ab.* 909.

(e) 3 *Q. B.* 493.

(f) *Shaw v. Sturton*, 2 *Lev.* 86; 3 *Keb.* 163; *Huthwaite v. Phaire*, 1 *M. & Gr.* 159.

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PROPERTY.****CAP. VII.**

Obligation of
representative
to account—
for what
assets.

by suit, he can in any case protect himself by such a discharge of his liability.

Though it thus follows that no personal representative has a right to collect assets or give discharges for debts in any country other than that where his grant was obtained, yet where he does so, and brings them home within the jurisdiction of the Court from which his grant proceeded, it would seem that he is liable to account to it for the administration of those assets, just as if they had been received and collected within the limits of his authority (a). Though this doctrine is mentioned with some disapprobation by Story, it would appear to follow from the view of the English Courts, mentioned above, that a grant of probate or administration properly obtained here extends to all the personal property of the deceased, wherever situate at the time of his death, at least in such a sense as to entitle an English representative to sue in relation to foreign assets (b).

(d.) *Probate and Administration Duties.*—The personal representative of the deceased being therefore compellable to clothe himself with the authority of the English Courts, in order to reduce into possession assets locally situate in England, as has been explained, comes under the English Acts which regulate the probate and administration duties, to which the English assets are liable without reference to the domicil of the testator or intestate. The amount of this duty is to be regulated, not by the value of all the

on what effects assets which an executor or administrator may ultimately they attach.

administer under the will or letters of administration, but by the value of such part as are at the death of the deceased within the jurisdiction of the Court by which the probate or letters of administration are granted (c); and it attaches on *bona notabilia* in the place where the goods happen to be situate, wholly irrespective of the question of

(a) *Dowdale's Case*, 6 Co. 47; Story, § 514, a.

(b) *Whyte v. Rose*, 3 Q. B. 507; *Scarth v. Bishop of London*, 1 Hagg. Eccl. 625.

(c) Williams on Executors, i 617; *Raymond v. Von Waterville*, 2 Cas. temp. Lee, 551.

Local situa-
tion of effects
at death.

the domicil of the testator (*a*), the test being whether the goods in question are effects which, under the old law, the Ordinary would have had to administer in case of intestacy (*b*). Thus probate duty is not payable in respect of French *rentes*, which were sold out and whose proceeds were transmitted to the executor in London of a domiciled Englishman after his death (*c*). The same principle was confirmed by the House of Lords in respect of American stock in the case of *Attorney-General v. Hope* (*d*), the stock being in both cases regarded as locally situate only in the place where it is transferable. And it was similarly held that probate duty was not payable in respect of notes or securities given by the East India Company, payable in India, although the testator had agreed before his death that the notes in question should be converted into stock, registered and transferable in England, and this was in fact done shortly after his death (*e*). So, where the testator was domiciled in England, it was held that probate duty was due and payable in Scotland under statute 48 Geo. 3, c. 149, s. 38, in respect of shares in certain companies in Scotland constituted under the Companies Clauses Consolidation Act (Scotland), 1845. But the local situation of transferable securities, which pass from hand to hand, is that in which they are found, and not the place where the principal or interest due on them is to be paid; and probate duty is therefore payable in respect of such "bonds" of foreign governments as come within the above description, and are in England at the time of the death of the owner, being in effect saleable chattels (*f*). And where the testator, who died in India, had directed his bankers there to realize certain securities, and to transmit the proceeds to his bankers in England, and the securities had been converted into bills of exchange drawn upon a

(*a*) *Fernandes' Executor's Case*, L. R. 5 Ch. 314; *Thomson v. Advocate-General*, 12 Cl. & F. 1.

(*b*) *Attorney-General v. Bouwens*, 4 M. & W. 171.

(*c*) *Attorney-General v. Dimond*, 1 Cr. & J. 356; S.C. 1 Tyr. 243.

(*d*) 1 C. M. & R. 530; 2 Cl. & F. 84.

(*e*) *Pearse v. Pearse*, 9 Sim. 430.

(*f*) *Attorney-General v. Bouwens*, 4 M. & W. 171.

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at death.

London bank payable six months after sight, which were actually on their way to England when the testator died, it was held that probate duty was payable here in respect of the proceeds (a). The judgment of the majority of the Court in that case went on the ground that the debts or assets to which the bills of exchange were evidences of the title, or the credit which they represented, were locally situate in England; but Kelly, C.B., was of opinion that the bills themselves were personal chattels, and that the fact that they were upon the high seas at the time of the testator's death did not exempt them from the liability to duty. This latter view was in some measure supported by *In the Goods of Wyckoff* (b), where administration was granted by the English Court of Probate of assets, including unaccepted bills of exchange, belonging to and in the possession of the deceased, an American citizen, who died on board a British ship on the high seas, bound for this country. On the principle of *Attorney-General v. Bouwens*, probate duty is payable on the value of all British ships or shares in British ships wherever they may be (c), for they are capable of being dealt with in this country by a bill of sale, and also upon the value of any cargoes in ships which are capable of being dealt with here by means of the bill of lading (d). And with regard to specialty *chooses in action*, it is enacted by 25 & 26 Vict. c. 22, s. 39, that "for the purposes of the stamp duties on probates of wills and letters of administration, debts and sums of money due and owing from persons in the United Kingdom to any deceased person at the time of his death on obligation or other specialty, shall be estate and effects of the deceased within the jurisdiction of Her Majesty's Court of Probate in England or Ireland, as the case may be, in which the same would be if they were debts owing to the deceased upon simple contract, without regard to the place where the obligation or specialty shall be at the

(a) *Attorney-General v. Pratt*, L. R. 9 Ex. 140; see as to Indian Government notes, &c., 23 Vict. c. 5.

(b) 3 Sw. & Tr. 20.

(c) By 27 & 28 Vict. c. 56, s. 4.

(d) *Hanson on Probate and Succession Duty*, pp. 7, 160.

Double ad-
ministration
duty imposed
by the *lex
situs*.

time of the death of the deceased." Where the law of the country where the personal estate is situated requires a double administration to be taken out, in order to reduce it into possession, it was held by the House of Lords that double duty is payable, notwithstanding the fact that the person beneficially entitled and the parties through whom he claimed had always been domiciled abroad. In that case (a) there was personal estate here of S., who died intestate domiciled in England. The sole next of kin was a married woman domiciled in the United States, who died without having administered or done anything to reduce her rights into possession. Her husband retained his American domicil, and died without having taken out administration to his wife. According to our law, apart from considerations of domicil, the child of these parents would be compelled to take out two administrations, one to his father, the other to his mother, on each of which administration duty would be payable; and it was decided that this law was applicable to the circumstances stated, notwithstanding the fact that, by the law of the United States, the claimant might have been entitled to represent his mother (the next of kin to the original intestate) directly; though Lord Westbury differed from the other law lords on this point. It was pointed out that if the claimant had constituted himself the personal representative of his mother in America by taking out letters of administration there, where she was domiciled, he could have come to the English Court for ancillary letters of administration of her estate here, in which case the claim of the Crown to double duty would have been evaded. As a matter of fact, he came before the English Court as the personal representative in America of his father, having taken out administration to his estate there, but that did not help him; it being still necessary for him to constitute himself his father's representative here (whether by ancillary administration or otherwise), and then take out administration to his mother in that character.

(a) *Partington v. Attorney-General*, L. R. 4 H. L. 100.

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Succession
and legacy
duties—de-
pendent on
the domicil
of deceased.

(e.) *Succession and Legacy Duty.*—It has thus been shewn that for the purpose of probate or administration duty, which is a tax imposed by the government within whose dominion the property lies, upon its collection into the hands of the personal representative, the local situation of the property is alone taken into consideration. For the purpose, however, of legacy or succession duty, which is a tax upon the transmission of property, the actual situation of the subject-matter is disregarded, and the maxim “*mobilia sequuntur personam*” strictly adhered to. Until the case of *Thomson v. Advocate-General* (a), the question was not free from doubt, and the older cases (b) are not all inconsistent with a tendency to refer the decision to the situation of the property at the time of its actual appropriation to the purposes of the testator's will. That decision of the House of Lords, however, put the matter at rest, and it is now clearly established that legacy duty is payable only to the government of the testator's domicil, without reference to the actual locality of the property at the time of his death. The same principle was established as to succession duty in the event of intestacy by the case of *Wallace v. Attorney-General* (c). According to Parke, B., in *Attorney-General v. Napier* (d), the correct doctrine was first broached in *In re Ewin* (e), and rests upon the general principle, that for ordinary purposes personal property is to be considered as situate in the place where the owner of it is domiciled at the time of his death, the previous decisions inconsistent with this view having been decided without adverting to the important distinction between domicil and residence. Where a person dies abroad, the *onus* of proof appears to be on the Crown to shew that his domicil was English, the presumption of law being against that view; and unless this burden of proof is successfully maintained, the Crown will not be

(a) 12 Cl. & F. 1; *Cockrell v. Cockrell*, 25 L. J. Ch. 730.

(b) *Attorney-General v. Cockerill*, 1 Price, 165; *Attorney-General v. Beatson*, 7 Price, 560; *Logan v. Fairlie*, 1 My. & Cr. 59; *Attorney-General v. Forbes*, 2 Cl. & F. 48; *Arnold v. Arnold*, 2 My. & Cr. 256.

(c) L. R. 1 Ch. 1.

(d) 6 Ex. 220.

(e) 1 Cr. & J. 151.

entitled to legacy duty (*a*). In the case, however, of *In re Capdevielle* (*b*), it had been held that though legacy duty was payable only to the government of the testator's domicil, yet succession duty was payable to the Crown under the will of a testator who died in England while still domiciled in France, in respect of personal property situate in this country at the time of his death. The Court of Exchequer, in the case cited, were apparently of opinion that they were bound by the decisions in *In re Lovelace* (*c*) and *In re Wallop's Trusts* (*d*), which were, however, cases of testamentary appointments under English instruments, to be governed, as will be shewn below, by different considerations. The decision of the Court of Exchequer in *In re Capdevielle* must therefore be regarded as overruled by the Court of Chancery Appeal in *Wallace v. Attorney-General* (*e*). The rule laid down by Lord Cranworth in *Wallace v. Attorney-General* is strictly confined in its operation to personal chattels, and the duty is not due upon a legacy or annuity charged on foreign land (*f*), or upon the proceeds of such land directed to be converted, nor upon chattels real abroad. But chattels real in this country come of course under the operation of the English Legacy and Succession Duty Acts, without regard to the domicil of the owner. And it has been suggested (*g*) that in the case of a British subject dying domiciled abroad, and leaving a will of personal property situate here bad according to the law of his domicil, but good under English law by virtue of 24 & 25 Vict. c. 114 (*h*), the property should be liable to legacy duty here, inasmuch as the title of the person to whom it is given depends wholly on the law of this country.

(*a*) *President of United States v. Drummond*, 33 L. J. Ch. 501; *Ander-*
son v. Lancerville, 9 Moo. P. C. 825.

(*b*) 33 L. J. Ex. 306.

(*c*) 4 De G. & J. 340.

(*d*) 1 De G. & S. 656.

(*e*) L. R. 1 Ch. 1.

(*f*) *Attorney-General v. Napier*, 6 Ex. 620.

(*g*) *Hanson on Succession Duty*, p. 223.

(*h*) Sect. 1 enacts that wills and testamentary instruments made out of the United Kingdom by British subjects, wherever domiciled at the time of making the will or of death, shall be valid if made as required either by the law of the place where made, of the place of the testator's domicil at the time of making, or of the country where he had his domicil of origin.

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Movables appointed under powers, by donee domiciled abroad, may be liable to duty.

With regard to personal property not devised by a testator domiciled abroad, but appointed under a general power, duty is payable under the Succession Duty Acts, such property not being regarded as the property of the donee of the power, so as to be exempt from succession duty by the fact of his foreign domicil (*a*). In that case the property had been settled by an English marriage settlement, and if the power of appointment had not been exercised, would have devolved to the next of kin by the terms of the settlement, without forming part of the estate of the deceased at all. A similar question arose shortly afterwards, in the case of *In re Wallop's Trusts* (*b*), where an English testator by will settled personal estate in the hands of trustees, giving the enjoyment of the income and a power of appointment by deed or will to his daughter, and appointing certain further trusts in default of appointment. The daughter having exercised the power of appointment by will, died domiciled abroad, and it was held that the legacies so given were liable to succession duty, following the previous decision, under s. 2 of the Succession Duty Act, 16 & 17 Vict. c. 51. The chief distinction between this case and that of *In re Lovelace*, just cited, was that in *In re Wallop's Trusts* the death of the testator as well as that of the donor of the power had taken place after the coming into operation of the Succession Duty Act, s. 4 of which provides that where any person shall have a general power of appointment, under any disposition of property taking effect upon the death of any person dying after the time appointed for the commencement of the Act, over property, he shall, in the event of his making any appointment thereunder, be deemed to be entitled, at the time of his exercising such power, to the property or interest thereby appointed as a succession from the donor of the power; and that where any person shall have a limited power of appointment, under a disposition taking effect upon any such death, over property, any person taking any property by the

(*a*) *In re Lovelace*, 4 De G. & J. 340.

(*b*) 1 De G. & S. 656.

exercise of such power shall be deemed to take the same as a succession derived from the person creating the power as a predecessor. It was expressly pointed out by Lord Cranworth, in *Wallace v. Attorney-General* (*a*), that neither of the two cases last cited was to be considered as affected by that decision of the House of Lords. They were both cases of testamentary appointment under English instruments, not of wills ; and such instruments were necessarily to be construed by English law, not by the law of the domicil of the person executing the power.

But where a testator dies domiciled abroad, having by will created an English trust of personal estate, such that one or more successions will arise under it at a subsequent period or periods, the persons beneficially entitled to such successions will be liable to pay succession duty on the amounts taken by them, notwithstanding the foreign domicil of the testator (*b*). Malins, V.C., in deciding this case, conceived himself to be bound by the decisions of *In re Capdevielle* (*c*)—which has, however, been shewn to be distinguishable—and *In re Smith's Trusts* (*d*), where Stuart, V.C., had held that succession duty was payable under similar circumstances. The opinion of Malins, V.C., has since been confirmed by the House of Lords in the case of *Attorney-General v. Campbell* (*e*). In that case, the testator, who was domiciled in Portugal, made a will in this country, while on a visit to it, in English form, appointing English executors, and desiring that his property should be invested in English consols. An annuity was to be paid to a sister of the testator during her life, and at her death the part of his personal estate which had been set aside for this purpose was to be divided amongst his three children. The ground upon which succession duty was payable upon this division taking place was clearly put by Lord Hatherley. “In order to have the personal property administered you must seek the forum of that

Successions
arising out of
English trust
created by
foreign will.

(*a*) L. R. 1 Ch. 1.

(*b*) *In re Badart's Trusts*, L. R. 10 Eq. 288.

(*c*) 2 H. & C. 985.

(*d*) 12 W. R. 933.

(*e*) L. R. 5 H. L. 524.

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Settled fund
in England.

country where the person whose property is in question had acquired a domicil. Then, when you obtain possession of that property, you do all that has to be done in the country to which the testator belonged. The question is afterwards, when the property has been so obtained and administered, in what condition do you find the fund? You find it in the condition of a settled fund. That condition arises, no doubt, from the operation of the testator's will; but I can see no difference in consequence of that circumstance from its having arisen in any other manner, as, for instance, from a deed executed in his lifetime, as might have been the case, or supposing he had transmitted to his bankers a sum of money to be invested upon the same trusts. When there is any fund standing in this country in the names of trustees in consols or other property which has a quasi local settlement—as stock in the funds has—all the dividends having to be received in this country, and the persons who have to be dealt with in respect of it being persons residing in this country, that fund is liable to succession duty. The settlement provides for the succession, and the interest of each person on coming into possession is liable to the payment of duty upon that interest to which he so succeeds In the cases of *Thomson v. Advocate-General* (a) and *Wallace v. Attorney-General* (b), the Court had to deal with a fund which was to be administered, and which was in the course of administration, before the executor, or the person on whom the duty of administering it was imposed, had cleared himself and discharged himself of that duty. In those cases, he being a foreigner (c) (we must take him to be a foreigner, because the original owner of the property was a foreigner), you have nothing to do with the reception of the duty levied by Acts of Parliament on the person whom you are pursuing before a foreign tribunal. But when the duties which have been imposed upon him involve the placing of the money here, in funds within

(a) 12 Cl. & F. 1.

(b) L. R. 1 Ch. 1.

(c) *Foreigner*, i.e., in respect of domicil.

the functions of the judicature of this country, and when you find those funds in a state involving succession from one individual to another, then the duty has accrued, and you proceed to levy it" (a). Lord Westbury put his decision in the same case even more clearly upon the fact of the fund being *found* settled in England, without reference to the direction given by the testator's will. "You cannot apply an English Act of Parliament to foreign property whilst it remains foreign property; but after the purposes of administration have been answered, and distribution made, if a person taking a distributive part comes to this country and invests it upon trusts, it assumes the character of a British settlement and British property." In accordance with this principle it is pointed out by Mr. Hanson (on Legacy and Succession Duty, p. 226) that it is not necessary that the testator should have directed such an investment, but that the liability to duty equally attaches where the trustees have power to invest the property here or abroad at their discretion, or where it is already actually invested in this country; and he cites a case decided by Bacon, V.C. (b), where the rule was applied to the proceeds of American securities remitted to English trustees, and paid by them into Court in an action brought on behalf of the infant *cestui que trust*. And where the settlement was not by will, but by deed taking effect *inter vivos*, the property affected being locally situate in England, and consisting of an English policy of assurance and English consols, the person ultimately entitled under the settlement was held liable to the payment of succession duty on the amount received by him (c). In the same case the real principle was shewn by the refusal of Lord Romilly to attach such a liability to the rest of the personal estate settled by will on similar trusts, with a direction that it in England should be invested in English funds or lands, the whole

Personal
estate directed
to be settled
in England.

(a) L. R. 5 H. L. 528.

(b) *Thompson v. Birch*, Bacon, V.C., May 20, 1876.

(c) *Lyall v. Lyall*, L. R. 15 Eq. 1.

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Movables
vested in
English
trustees—
constructively
in England.

of such residuary personal estate being locally situate abroad at the time of the testator's death, and none of the proceeds of it having been remitted to England at the time of the succession of the person who was ultimately entitled under both instruments.

Nevertheless, it is not necessary, according to a recent decision of Sir G. Jessel's (*a*), that the funds should have been actually brought into England, if they are vested in English trustees, so that the *forum* to decide the ownership must be English. In that case a settlement made in England on the marriage of an Italian and an English-woman vested certain French *rentes* and shares in the Bank of France in English trustees. On the death of the husband and wife, the children of the marriage, who were domiciled Italians, became beneficially entitled to the trust funds, and the Commissioners of Inland Revenue claimed succession duty from the trustees. The trustees paid a sum sufficient to meet the duty into Court under Trustee Relief Act, and on the petition of the children to pay it out to them, it was held that the trust funds were not, under the circumstances, exempt from succession duty. It is difficult to see how this decision can be supported, except on the principle that the funds were constructively in England, because it would have been necessary to have recourse to an English Court to obtain payment from the trustees; and if the trustees, even continuing their English domicil, had gone to France, and had there either voluntarily or under the direction of the French law realized and paid over the whole trust funds without reserving anything to satisfy the English duty, it does not seem clear that they could have been made liable here on their return. That the fact of the foreign domicil of the person beneficially entitled is immaterial, if the trust funds are in England, had already been really decided by the case of *Attorney-General v. Campbell* (*b*); but considerable weight was attached by Jessel, M.R., in

(*a*) *Re Gigala's Trusts*, L. R. 7 Ch. D. 351.

(*b*) L. R. 5 H. L. 524.

Re Cigala's Trusts to the fact that the settlement under which the trustees took was made in England, by an Englishwoman, according to the forms of the English law.

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Notwithstanding the general principle that the law of the owner's domicil is applicable to personality generally, it is obvious that when the conflict is on the question as to what is personal estate, liable as such to duty, the *lex situs*, being that which alone has power to enforce its judgment, must prevail. In the case of *Chatfield v. Berchtoldt* (a) the question was whether a rent-charge *pur autre vie* issuing out of English land was liable to legacy duty as personal estate under the English statutes (14 Geo. 2, c. 20, s. 9, and 1 Vict. c. 26) which make estates *pur autre vie* applicable as personal estate in the hands of executors and administrators; and it was held on appeal that legacy duty was payable, although the domicil of the deceased was Hungarian, and in opposition to the contention that the character of personal property was so impressed by the English statutes upon the interest in question, as to exempt it from liability to legacy duty according to the principle of *Thomson v. Advocate-General* (b). The decision was given on the ground that the English law only made it personal property for the purpose of charging it with duty, and that it remained, except for this purpose, English realty governed by English law. Had it been the law of the testator's domicil that assumed to declare English realty to be personal estate, the case would have been too clear for argument; but in the actual circumstances the *lex situs* was given much stronger effect, being allowed to change the nature of realty into personality for its own purposes, without exposing it as such to the law of the foreign domicil. The decision, however, was clearly right on another ground, which has already been discussed (c). What the English law calls personal estate is not co-extensive with the class of "immovables" according to international law, including

(a) L. R. 7 Eq. 192.

(b) 12 Cl. & F. 1.

(c) *Suprà*, p. 141.

Chattels real,
though per-
sonalty, are
not movables.

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Rate of duty
—domicil of
successor.

as it does chattels real, to which the maxim *mobilia sequuntur personam* does not apply. Chattels real, which are regarded as personal property for many purposes by English law, are not thereby rendered *movables*, and it is to movables, and movables alone, that the maxim is admitted to extend (a).

When there is any doubt as to the rate at which legacy or succession duty is to be assessed upon the amounts transmitted, the *status* of the recipients and their relation to the deceased, must be decided according to the law of his domicil. Thus in *Skottowe v. Young* (b), the proceeds of land in England, devised by a British subject domiciled in France on trust to sell and pay the proceeds to his daughters born of a French mother before marriage, but afterwards legitimated according to French law, were held liable to legacy duty at the rate of £1 per cent. only, instead of the higher rate imposed by the Legacy Duty Acts upon gifts by a testator to strangers in blood. This is only the natural result of the application of the principle which construes and interprets wills of personal property by the law of the domicil of the deceased (c); just as in *Boyes v. Bedale* (d), where the domicil of the testator was English, a daughter born and legitimated under similar circumstances was held not to come within the description of "children" of her father, though he had acquired a French domicil.

Distribution
of movables
by personal
representa-
tive.

(f.) *Distribution of Movable Personal Estate by Executors and Administrators.*—The principles by which the administration of personal estate is governed having thus been considered with regard to the appointment and title of the personal representative, and the duties payable to the governments by whose authority or permission he acts, it remains to discuss the rules by which he is to be guided in satisfying such claims as may be put forward to the

(a) *Freke v. Lord Carney*, L. R. 16 Eq. 461, 466; *Jarman on Wills*, i. p. 4, n.

(b) L. R. 11 Eq. 474.

(c) *Vid. supra*, p. 191.

(d) *Boyes v. Bedale*, 1 H. & M. 798; *Goodman v. Goodman*, 3 Giff. 643.

personal estate in his hands. Under this head of the subject come all questions which relate to the priority of debts, the marshalling of assets, and the mode of proof against the estate, if it should be insolvent. It is needless to recapitulate the numerous authorities which have already been cited (*a*) to establish the general rule that the distribution of personal estate is governed by the law of the domicil. But with regard to the question of the priority of debts, with regard, that is, to its distribution as affects creditors, as distinguished from persons beneficially interested, an important doubt has been introduced. In a case where the deceased was domiciled abroad, and ancillary administration is taken out to his effects here, is such local administrator to be governed by the laws of this country or of that of the domicil of the deceased, in paying creditors who make their claim upon him in this country? and is there any difference as to this between debts originally contracted here, and those contracted in the country of the domicil? Westlake (*b*) and Story lay down positively that the law of the country from which the ancillary representative obtained his grant is to be followed, on the ground that he is accountable to that jurisdiction alone. This position, however, involves the assumption that the law of that jurisdiction does not adopt the law of the domicil of the deceased for such purposes, as it undoubtedly does for the general distribution of personal effects, and appears inconsistent with the *dictum* of Abbott, C.J., in *Doe v. Vardill* (*c*), that it is part of the law of England that personal property should be distributed according to the *jus domicilii*. Nor are there any conclusive authorities on the point. In *Cook v. Gregson* (*d*), which is cited in support of the proposition, it did not really arise, all that was decided there being that as against assets which had been brought from Ireland, where the testator was domiciled, an Irish judg-

(*a*) Pages 183, 195.

(*b*) Westlake, Priv. Int. Law, § 307; Story, § 524.

(*c*) 5 B. & C. 452.

(*d*) 2 Dr. 286.

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Priorities of
creditors—by
what law
governed.

ment creditor was entitled to priority. This is obviously a very different thing from saying that a priority given by English law, when assets are taken possession of in England, shall not be taken away by any law of the domicil of the deceased even as to foreign creditors. Transmission of the assets, after they have once been taken possession of by a local administrator, can obviously not affect the rights of creditors, which become vested at that time, as was decided in *Cook v. Gregson*, by whichever of the two laws they are to be regarded as being regulated. The claim of the *lex situs* was also recognised in the earlier case of *Hanson v. Walker* (*a*), but that decision again proceeded on a different principle, following the rule which subjects real property, and for this purpose, its proceeds, to the *lex situs* without reservation; and although in the course of the argument it was contended that the law of England, where the deceased was domiciled, would have governed the rights and priorities of creditors with regard to foreign personality, no decision was given on that point. Even if the case of *Cook v. Gregson* be considered as involving the principle that the *lex situs* and not the *lex domicilii* is to prevail on this point, it is confessedly in conflict with the decision of Sir J. Romilly in *Wilson v. Lady Dunsany* (*b*). In that case the deceased was domiciled in Ireland, and the assets in dispute were in England. The question was one of priority between creditors, and Sir J. Romilly said that, following the principle of *Thomson v. Advocate-General* (*c*), and other cases, where the personal estate had been administered according to the law of the domicil of the deceased, he was of opinion that he ought to treat the case as if he was administering the estate in Ireland. The point was again raised in the later case of *Pardoe v. Bingham* (*d*). In that case an Englishman residing in Venezuela executed an instrument there to secure repayment to a creditor of a sum of money, and the creditor,

(*a*) 7 L. J. Ch. 135.

(*b*) 18 Beav. 293.

(*c*) 12 Cl. & F. 1.

(*d*) L. R. 6 Eq. 485.

having registered the instrument in the form prescribed by the law of Venezuela, became entitled, by that law, to be paid his debt out of the general assets of the debtor in priority to other creditors. The debtor died in Venezuela, but it did not appear whether or not he had been domiciled there, and all that was decided was that the provisions of the *lex loci contractus* would not entitle a creditor to a priority not given by the law of the country where the assets were situate. It was suggested in the course of the argument that the deceased was probably domiciled in Venezuela, and that the Venezuelan law was entitled to be heard on that ground, but Lord Romilly refused to direct an inquiry as to this without a special application for that purpose, and gave no opinion as to the probable effect of such a fact, if it had been ascertained to exist. It cannot therefore be said that, as far as English precedents go, the proposition asserted by Story and Westlake is established; and the course of continental authority is admittedly the other way (*a*). Perhaps it may best be supported by regarding all questions of the priority of creditors as touching matters of *procedure*, a principle asserted in general terms by jurists (*b*), and recognised in English Courts as to distribution of assets under bankruptcy. In *Ex parte Melbourne* (*c*), a marriage contract settling personal estate on the wife had not been registered as required by the law of Batavia, where it was executed, and consequently was of no effect there as against third parties. The husband having subsequently become bankrupt in England, his wife claimed to prove against his estate for the sum settled, and her proof was admitted, on the general ground that the question of priority of creditors *inter se* must be governed by the law of the country where the bankruptcy takes place, and where the assets of the debtor are being administered.

Priorities—
belong to
procedure.

(*a*) Story, § 526; Westlake, § 308.

(*b*) *De la Vega v. Vianna*, 1 B. & Ad. 284; Story, § 323; Westlake, § 411, 277; Huber, tom. 2 lib. 1, c. 3.

(*c*) L. R. 6 Ch. 64; see, for the converse case, *Thurburn v. Steward*, L. R. 3 P. C. 478.

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In such a case the assets are of course regarded as being locally situate there, following the person of the bankrupt. The principle is perhaps best expressed in the words of Tenterden, C.J.: "A person suing in this country must take the law as he finds it; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer" (a).

SUMMARY.

(iii.) SUCCESSION TO MOVABLE PERSONAL PROPERTY.

(a.) *Disposition of Movable Personal Property by Will.*

p. 183.

The Court of the domicil of the deceased at the time of his death has supreme jurisdiction, and the law of the domicil supreme authority, in all matters connected with the capacity of the testator, the formalities, execution, interpretation, construction, and effect, of a will of movable personal property.

p. 184.

But, under Lord Kingsdown's Act (24 & 25 Vict. c. 114), the wills of British subjects, whether the domicil at the time of the death or of making, if made out of the United Kingdom, are also valid if the forms required either by the law of the place of making, the law of the domicil at the time of making, or the law of the domicil of origin have been complied with; and if made *within* the United Kingdom, are also valid if the forms required by the law of the place of making at the time of the making have been complied with. And by the same statute, no will, at least of a British subject, is revoked or becomes invalid by a change of domicil between the times of making and of the death.

p. 188.

But a power of appointment by will to movable personalty, given under English law, will be validly exercised by a will made in conformity with English law, though

(a) *De la Vega v. Vianna*, 1 B. & Ad. 284, 288.

not with the law of the domicil of the deceased at the time of his death. Such a will will be admitted to probate accordingly; though it seems that a will executed in compliance with the law of the domicil would be equally p. 191. entitled to recognition.

To entitle a will or other testamentary paper to English p. 193. probate, it must dispose of some personal property situate in England, or else be incorporated by express or implied reference in another will or testamentary paper entitled to probate on its own account.

In granting probate of the will of a testator not domiciled in England, the English Court will, as a rule, follow the grant of the Court of the domicil, and grant probate or administration with the will annexed to the person who has been duly clothed by the Court of the domicil with the power and duty of administering the estate. pp. 193, 199,
200.

(b.) Succession to Movable Personal Property by operation of Law.

The Court of the domicil of an intestate at the time of p. 194. his death has supreme jurisdiction, and the law of the domicil supreme authority, in all matters connected with the succession to his movable personal estate.

The law of the domicil of the intestate will thus determine the persons entitled to administration, and those entitled to share in the distribution. The same law will decide their legitimacy, kinship, and mutual rights and liabilities touching exoneration, election, and all similar questions. p. 195.

(c.) Right and Title of the Personal Representative.

A grant of probate or letters of administration has no p. 198. extra-territorial operation; and the personal representative under it acquires only a title to the personal chattels of the deceased within the jurisdiction of the Court which made the grant.

To take possession of personality in England, or sue for

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pp. 198-200.

debts in an English Court, a personal representative must therefore prove the will or take out letters of administration here as well as in the country of the domicil of the deceased. But this rule does not operate to prevent a personal representative clothed with authority by the English Court from suing in England in respect of movables actually situate abroad.

p. 200.

In granting probate or letters of administration, the English Court will generally follow the grant (if any) made by the competent Court of the domicil; but it appears doubtful if the mere fact, that a person has obtained a grant as executor in the foreign court, will entitle him as of right to recognition of that character here. If the English Court does not consider him entitled as executor, it will, it seems, grant him letters of administration *cum testamento annexo*.

p. 203.

The personal representative, when once clothed with authority by the English Court, is bound to administer the personal assets of the deceased in England.

The title of a personal representative to the personal assets within the jurisdiction of the Court from which he derives his authority, is not divested by the removal of the assets to another jurisdiction, unless they are removed under such circumstances as to remain still unappropriated assets, belonging to the general estate.

p. 204.

The effect of Scotch and Irish probates in England is regulated by the statutory provisions of 21 & 22 Vict. c. 56, s. 12, and 20 & 21 Vict. c. 95, respectively. A foreign personal representative, who has not obtained authority from an English Court, nor received English assets, cannot be sued in his representative character in England.

(d.) Probate and Administration Duty.

p. 208.

When probate or administration is granted by an English Court, probate or administration duty is payable to the English government on the value of the assets locally

situate in England at the time of the death of the deceased, without reference to the law of his domicil, or the value of the assets situate there.

The local situation of transferable securities, which pass p. 209. from hand to hand, is that in which they are actually found.

The local situation of stocks and shares, transferable only in one place, is the place where they are so transferable.

If the law of the country where assets are locally situate p. 211. requires double administration to be taken out in order to reduce them into possession, double duty is payable to the local government. The law of the domicil of any or all of the parties is in such a case immaterial.

(e.) *Succession and Legacy Duty.*

Succession and legacy duty is payable to the English p. 212. government in respect of the personal estate of every testator who dies domiciled in England; and is assessed not only on his personal estate in England, but upon all his personal movable estate, wherever situate in fact.

The duty does not attach upon annuities or legacies p. 213. charged on foreign land, nor upon chattels real abroad.

Succession duty is payable upon chattels real situate in England, though the domicil of the testator be foreign. The personal character of such estate, and its liability to English succession duty, is determined by the English law as the *lex situs*, claiming in that right to govern immovables.

Succession duty is payable on personal estate appointed p. 214. by the will of a testator domiciled abroad, under a power of appointment created by an English will or settlement. [And see the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 4.] So also, on successions to a settled fund vested in English trustees, consisting of English stocks and shares, though the instrument creating the settlement was the will of a testator domiciled abroad. But not, if

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p. 217.

seems, by the trustees who take immediately under such a will.

So, where the instrument creating the trusts of the settlement is a deed *inter vivos*. So, it seems in such a case to be sufficient that the funds should be vested in English trustees, though they have not actually been brought into England.

p. 220.

When succession duty is calculated according to the degree of relationship between the successor and the person from whom the succession is derived upon his death, that relationship is determined by the law of the domicil of the deceased.

(f.) *Distribution of Movable Personal Estate by Executors and Administrators.*

p. 220.

The distribution of movable personal estate in the hands of executors or administrators is regulated generally by the law of the domicil of the deceased.

p. 221.

But when the deceased was domiciled abroad, and ancillary administration is taken out here, it is doubtful whether the priorities of creditors will not be regulated by the English law, as that from which the local administrator derives his authority. The English law will clearly prevail, as the *lex fori*, whenever a matter of procedure is involved.

(iv.) *Assignment of Personal Property by Law on Bankruptcy or Insolvency.*—The transfer of personal property by alienation *inter vivos* and by succession by devise or *ab intestato* having been now considered, it becomes necessary to discuss the operation of the universal assignments which take place by operation of law upon the bankruptcy of the owner. The first question is, to what property of the bankrupt do these universal assignments to trustees or assignees for the benefit of his creditors extend? And this question must be regarded as quite apart from that which is apparently connected with it, as to the effect of

a bankruptcy in one jurisdiction in discharging debts contracted in or sued for in the courts of another, depending as it does upon entirely different principles. The latter question will be discussed when the nature of obligations is treated of, and their inherent liability to discharge.

The question then being simply as to the view taken by English Courts of the effect of a bankruptcy in assigning the personal property of the bankrupt, it is obvious that two sorts of bankruptcies have to be considered. It must be seen, first, what effect English Courts attribute to an English bankruptcy, and secondly, what to a foreign one, with regard to property situate both within and without the jurisdiction under which the assignment is made.

First, then, with regard to an English bankruptcy, by s. 15, subs. 3, 4, 5, of the Bankruptcy Act, 1869, it is enacted that there shall pass to the trustee under the bankruptcy all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him during its continuance (with certain exceptions in the previous subsections which are immaterial to this question) all powers in or over or in respect of property, and all goods and chattels being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt, being a trader, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition of owner. Choses in action, other than debts due to him in the course of his trade or business, are excluded from this last category, of goods of which he has the reputed ownership. It will be seen that there is thus no territorial limitation in the statute, which regards the actual situation of personal chattels as immaterial, on the principle of *mobilia sequuntur personam*, nor is there indeed any express limitation as to real estate, which is included by the definition clause (s. 4) in the general term of property, but it has been already pointed

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out (a) that as to real estate and chattels real, an assignment is good by the *lex situs* alone. This extensive operation of the statute as to personal chattels is in accordance with the view taken by English law; and it is well established in England that an English assignment in bankruptcy operates as a complete and valid transfer of all the personal chattels of the bankrupt wherever they are situate (b). And this is so, in the contemplation of English law, whatever the domicil of the bankrupt. In *Ex parte Crispin* (c) it was decided on appeal that an alien non-trader domiciled abroad who contracts debts in England may be made a bankrupt under the Bankruptcy Act, 1869, provided that an act of bankruptcy has been committed in England, although he may have left England before the petition for adjudication is presented. So under the older statutes, it was held that the essential requisite to make an act of bankruptcy cognizable in our courts, was that it should have been committed in England (d). In *Phillips v. Hunter*, just cited, it was said that no foreign residence—i.e., domicil—could exempt an English subject from the operation of the bankruptcy laws, whether such residence was temporary or permanent; but the question of nationality appears now to be immaterial for this purpose, much less weight being now given to it in such matters than was formerly the case. The principle of *Ex parte Crispin* (e) that a foreigner, who has contracted a debt in England and committed an act of bankruptcy in England, is amenable to our bankrupt law, was extended by a later decision (f) to the case of a foreigner who has committed an act of bankruptcy in England, and is proceeded against under the Bankruptcy Act by another foreigner in respect of a debt contracted

(a) *Suprà*, p. 166.

(b) *Phillips v. Hunter*, 2 H. Bl. 402; *Sill v. Worswick*, 1 H. Bl. 665; *Hunter v. Potts*, 4 T. R. 182; *Wilson's Case*, cited 1 H. Bl. 691; *Neal v. Cottenham*, 1 H. Bl. 182, n.; *Ex parte Blakes*, 1 Cox, 398.

(c) L. R. 8 Ch. 374; 42 L. J. Bank. 65.

(d) *Ex parte Smith*, Cowp. 402; *Inglis v. Grant*, 5 T. R. 530; *Norden v. James*, Dick. 533.

(e) L. R. 8 Ch. 374; 42 L. J. Bank. 65.

(f) *Ex parte Pascal, Re Meyer*, L. R. 1 Ch. D. 509.

abroad. It was contended on behalf of the bankrupt that, though his transient presence in England would make him liable to a common law action in respect of the debts contracted abroad (*a*), yet it did not render him subject to the service of a debtor's summons under the Bankruptcy Act, for which the same jurisdiction was necessary as in cases of actual adjudication (*b*). Mellish, L.J., however, expressed his opinion that transient presence and the commission of an act of bankruptcy in England were sufficient to found jurisdiction under the Bankruptcy Act, 1869, whether for the service of a debtor's summons simply, or for petition and adjudication. By the earlier Bankruptcy Consolidation Act of 1849 (s. 277) foreigners who were traders were expressly made subject to the banking laws, and under this and the older statutes it was decided that foreign residence was immaterial (*c*). The decisions in the cases of *Ex parte Crispin* and *Ex parte Pascal* just cited, shew clearly that the question of domicil need not now be regarded, although Story seems to consider it as the basis of the principle now under discussion.

English Courts, therefore, will regard the title of the Foreign trustee in an English bankruptcy to personal property situate abroad as complete, but the question assumes a slightly different form where this title has already been disregarded by a foreign Court, and a creditor of the bankrupt has possessed himself by foreign judicial process of the foreign property. Where such creditor is domiciled in England and has notice of the English bankruptcy, the assignees have been held entitled to recover the proceeds he had thus appropriated in an action for money had and received (*d*); but appear to have no right of action against a foreign garnishee, who has paid a debt due to the bankrupt estate to the creditor under or in expectation of the

(*a*) *Jackson v. Spittall*, L. R. 5 C. P. 542.

(*b*) *Ex parte O'Loghlen*, L. R. 6 Ch. 406, 410.

(*c*) *Alexander v. Vaughan*, Cowp. 398; *Allen v. Cannon*, 4 B. & A. 418; *Ex parte Smith*, Cowp. 402; *Williams v. Nunn*, 1 Taunt. 270.

(*d*) *Hunter v. Potts*, 4 T. R. 182; *Phillips v. Hunter*, 2 H. Bl. 402; *Sill v. Worwick*, 1 H. Bl. 665; *Ex parte Soinde Ry. Co.*, L. R. 9 Ch. 557.

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compulsion of a competent jurisdiction (a). From the judgment of Lord Rosslyn in *Sill v. Warwick* Mr. Westlake deduces, first, that the title of the assignees ought to be preferred to that of any creditor by a foreign Court, if intimated to it *pendente lite*, and secondly, that if it is disregarded by it, an English creditor, but not a foreign one, will be compelled in an English Court to yield the proceeds he has acquired abroad to the English assignees (b). The distinction drawn between an English and foreign creditor is clearly one of nationality in the authorities on which this proposition is based, but Mr. Westlake, though speaking of an "Englishman" and "an English creditor," uses language that would lead to the belief that the English domicil is or should be the distinguishing test. The distinction between domicil and nationality was not so clearly marked at the end of the last century, when those cases were decided, as it is at present, and it is certainly difficult to see now in what sense an English subject who has acquired a foreign domicil remains subject to the English bankruptcy law with regard to his acts done abroad, so as to be bound by an assignment under it of the property of an English bankrupt any more than other people. If the creditor was *domiciled* in England, and so subject to its laws, the case would be very different, but even then there appears no authority in the cases cited for saying that he would be compelled to refund, if the foreign Court, after due notice of the title of the assignees, had pronounced judgment in his favour. All that is said is that no foreign Court that respected the comity of nations ought to pronounce such a judgment, but that a creditor who recovers in such a way, and is not subject to the bankrupt laws of England nor affected by them (whatever that may mean), can certainly not be compelled to refund, if sued by the assignees. The validity of such a judgment if pronounced,

(a) *Le Chevalier v. Lynch*, Dougl. 170; *Cleve v. Mills*, Cock. 1764; *Allen v. Douglas*, 3 T. R. 125.

(b) *Westlake*, § 279; 1 H. Bl. 693; 2 H. Bl. 405, 406, 408.

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being in a certain sense *in rem* (a), can hardly on general principles be questioned, at any rate as between the parties to it. Where there has been no judgment pronounced by the foreign Court, but a creditor has merely obtained possession by foreign attachment of the bankrupt's property, it is clear from the later case of *Selkirk v. Davis* (b) that whether there has been a formal intimation to the garnishee or not of the bankruptcy, the creditor can take nothing by such diligence, and if he can be reached by the English Court, will be compelled to refund. If he is neither present within the jurisdiction, nor has property within it, nor comes before the English Court of Bankruptcy to prove for other debts due to him in excess of the value of what he has acquired by the foreign process (c), it is plain that he cannot be reached or in any way obliged to disgorge. This principle was also admitted in *Ex parte Dobree* (d), where the only real dispute was whether the foreign attachment was complete, so as to vest the property attached, before the English bankruptcy or not. Where the bankrupt was a partner in a firm trading and having assets both in England and the West Indies, and after the English bankruptcy, a creditor of the firm attached a debt due to the firm in the West Indies, it was held that the assignees could not compel him to refund the proceeds thus obtained (e), the principle being apparently that the English bankruptcy could not affect the partnership assets situate abroad, as against the foreign creditors and the foreign partners. The ordinary rule applicable to the bankruptcy of a partner being that the partnership is dissolved, and that the trustee in the bankruptcy becomes tenant in common with the other partners of the partnership property, who retain their

(a) Story, § 592; *McDaniell v. Hughes*, 3 East, 367; *Cammell v. Sewell*, 29 L. J. Ex. 850.

(b) 2 Rose, 291; S.C. 2 Dow, 230; see also *Royal Bank of Scotland v. Cuthbert*, 2 Rose, 78; *Smith v. Buchanan*, 1 East, 6.

(c) As in *In re Oriental Inland Steam Co., Ex parte Scindia Ry. Co.*, L. R. 9 Ch. 557.

(d) 8 Ves. 82.

(e) *Brickwood v. Miller*, 3 Mer. 279; *Waring v. Knight*, cited in *Phillips v. Hunter*, 2 H. Bl. 410.

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authority to deal with the business in order to wind it up (*a*), the decision of Sir W. Grant in the case just referred to appears to have been correct.

So much for the effect of an English bankruptcy in assigning personal chattels of the bankrupt situate abroad. As to the operation of a foreign bankruptcy in England, the same universal effect of such an assignment that the English law claims for bankruptcies declared by itself, is conceded by it to those which result from the laws of foreign countries. Accordingly, it is settled that an assignment by a foreign bankruptcy passes all the personal property of the bankrupt situate in England, including *choses in action* (*b*). *Re Blithman* (*c*) is perhaps a little inconsistent with this doctrine, Lord Romilly holding that the question whether or not an Australian insolvency applied to personality in England depended upon the domicil of the insolvent, who had died since the adjudication, and that if his domicil was English, and an Australian domicil had not been acquired, the title of his English executrix must prevail. It does not appear to have been quite clear whether Lord Romilly considered that it was the domicil at the time of the adjudication of insolvency, or that at the time of the death which ought to be regarded, as he uses expressions consistent with either view, and mutually contradictory in his judgment; but it is submitted that as the English bankrupt law does not require an English domicil to found its jurisdiction (*d*), so it should recognise foreign insolvencies and bankruptcies without inquiring whether the subject of them was or was not domiciled in the country where his bankruptcy or insolvency was declared; and this view seems to be supported by the judgment of James, L.J., in a later case (*e*). And though it is of course established law that the personal estate of a testator or intestate shall be distributed accord-

(*a*) *Lindley on Partnership*, p. 1175.

(*b*) *Solomons v. Ross*, 1 H. Bl. 131, n.; *Tollet v. Deponthieu*, *ib.* 132, n.; *Potter v. Brown*, 5 East, 124; *Ex parte Cridland*, 3 V. & B. 94.

(*c*) 35 Beav. 219; L. R. 2 Eq. 23.

(*d*) *Suprà*, p. 230.

(*e*) *In re Davidson's Settlement Trusts*, L. R. 15 Eq. 383.

ing to the law of his domicil, yet in the first place, the Australian assignment under the insolvency in the case of *Re Blithman* ought to have been held operative on the English property by English law, as part of the law of nations, and not merely by the Australian statute; and secondly, if it operated at all, it did so at once, so that at the time of the death the English property belonged to the assignees under the insolvency, and was not part of the estate of the deceased for purposes of succession at all. Where the foreign bankruptcy is pending, and the bankrupt, without having obtained his discharge under it, is adjudicated bankrupt on a new petition in England, it would seem on principle that there should be no distinction between this case and that where both the bankruptcies are English (a). In such an event it was decided, prior to the Bankruptcy Act of 1869, that the Court would support the title of the assignees under the later bankruptcy against those under the earlier one in respect of property acquired between the two bankruptcies, but not, of course, in respect of that which the bankrupt had previously held (b).

All the property of the foreign bankrupt being vested in his assignees, they become of course entitled to his *choses in action*, for which they may have to come to English Courts, and their right to sue there in their own names depends in the first place upon the original negotiability or liability to assignment of the obligation which it is sought to put in force. If the obligation was negotiable or assignable in its inception, then the assignees may sue in their own names (c), the question not being then of the remedy available, which is a matter for the *lex fori* (d), but of the nature of the contract. If, on the other hand, the *chose in action* is an ordinary debt, the assignees are not, according to the view best supported, entitled to sue on it in their own names (e). In the case of *Alison v.*

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(a) Griffith on Bankruptcy, p. 94.

(b) *Morgan v. Knight*, 33 L. J. C. P. 168.

(c) *Jeffery v. M'Taggart*, 6 M. & S. 126; *Wolff v. Oxholme*, *ib.* 99.

(d) *Infrà*, Chap. X. (e) *Wolff v. Oxholme*, 6 M. & S. 92, 99.

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Furnival (a), the point was not distinctly raised. There the bankrupt, prior to his bankruptcy and the appointment of provisional syndics in France, had become the creditor of the defendant on a French award and judgment, and the contest was rather whether two of the syndics were entitled to sue in their own names by the law of France, than whether the English law as to the non-assignability of obligations was to prevail. *O'Callaghan v. Thomond* (b), where the assignee of an Irish judgment, made assignable by an Irish statute, was held entitled to sue in his own name, was not cited, but the Court were perhaps entitled to apply the principle of that case, the debt being on a French judgment. Parke, B., in his judgment, treated the plaintiffs not strictly as assignees of the creditor's *chooses in action*, but as mandatories or agents for the creditors under the French bankrupt law. In *Smith v. Buchanan* (c) Lord Kenyon said the English law so far gave way to foreign laws of bankruptcy that assignees of bankrupts deriving title under foreign ordinances were permitted to sue here for debts due to the bankrupt's estate, but that *dictum*, if it meant that such assignees were entitled to sue in their own names, is certainly inconsistent with the later cases already cited (d), and considerable doubt is thrown by Story, § 565, on the decisions in the two cases mentioned above. The general principle that an obligation not assignable in its inception cannot be sued for by an assignee, either for valuable consideration or under a bankruptcy, in a form which does not recognise the ordinary assignment of *chooses in action*, appears to be strictly analogous to the rule as to debts due to the estate of a testator or intestate, which requires the personal representative to perfect his title according to the *lex fori*, by taking out administration in his own name, before he can recover them by suit.

By the Judicature Act, 1873, s. 25, subsect. 6, it is

(a) 1 C. M. & R. 277.

(b) 3 Taunton, 81.

(c) 1 East, 6, 11.

(d) *Jeffery v. McTaggart*, 6 M. & S. 126; *Wolff v. Oxholme*, *ib.* 92; *Folliott v. Ogden*, 1 H. Bl. 131.

enacted that any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal *chose in action*, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or *chose in action*, shall be, and be deemed to have been, effectual in law (subject to prior equities) to pass and transfer the legal right to such debt or *chose in action* from the date of such notice, and all legal and other remedies for the same. It would, therefore, seem that the assignees under a foreign bankruptcy could now obtain a clear title to sue in their own names for *chooses in action* of the bankrupt in England, by calling upon him to execute to them such a written assignment as the section just quoted contemplates, and giving the required notice to the garnishee. The distribution of assets under a bankruptcy is entirely a matter for the *lex fori*, under the authority of which the bankrupt has been adjudicated and the distribution ordered. Thus all questions of the priority of creditors must be determined by the law of the country where the bankruptcy takes place (*a*), and the question whether or not a creditor's claim is capable of proof at all must be referred to the same test (*b*). And where double proof against the estates of two bankrupt firms is not allowed by English law, the fact that the first bankruptcy under which the creditor has proved was in Brazil will not render his proof admissible under the bankruptcy in England (*c*). It should be remarked, however, that in this case the bills which it was desired to make the subject of the proof had been accepted in England, so that the English law might have been applied as that of the place where the contract was to be performed (*d*). Moreover, a foreign creditor, residing out of the jurisdiction of the

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(*a*) *Thurburn v. Steward*, L. R. 3 P. C. 478; *Pardo v. Bingham*, L. R. 6 Eq. 485.

(*b*) *Ex parte Melbourn*, L. R. 6 Ch. 64.

(*c*) *Ex parte Goldsmid*, 7 H. L. C. 785; S.C. 1 De G. & J. 257.

(*d*) See judgment of Turner, L.J., 1 De G. & J. 285, and *Don v. Lippman*, 5 Cl. & F. 1.

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Court of Bankruptcy, who comes in and proves his debt in an English bankruptcy or liquidation, brings himself thereby within the general jurisdiction of the Court as to the administration of the estate, just as if he were residing within it; so that an order can be made upon him to restore property of the bankrupt or debtor improperly in his possession (a). It would seem that the mere fact of a foreign assignee being present in England with assets in his hands will not warrant an English Court in assuming to control his management of the estate, at any rate unless it is sufficiently shewn that the bankrupt has failed to obtain justice in the ordinary courts of the country where the bankruptcy took place (b).

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BANKRUPTCY OR INSOLVENCY.**

p. 230.

To found the jurisdiction of the Bankruptcy Court, it is not necessary that the alleged bankrupt should be domiciled in England. It is sufficient if the debt in respect of which bankruptcy proceedings are taken was contracted, and the act of bankruptcy took place, in England, the debtor himself being commorant or even transiently present there. And it seems to be enough that the last two conditions should be complied with, though the debt was contracted abroad.

Assignment under an English bankruptcy includes all movable personal estate of the bankrupt, wherever situate, and whatever his domicil.

pp. 231, 232.

The title of the trustee is therefore complete to all movable chattels of the bankrupt abroad, including *chooses in action*. But if a foreign creditor of the bankrupt has obtained possession of any such movables by a competent judgment of a local Court, the title of the trustee will not prevail against him even in England; though there is

(a) *Ex parte Robertson, Re Morton*, L. R. 20 Eq. 733.
 (b) *Smith v. Moffatt*, L. R. 1 Eq. 397.

some authority for contending that if a domiciled Englishman has used like diligence, an English Court will not allow him to hold the proceeds as against the trustee. Nothing less, however, than a *judgment* of a competent foreign Court will in any case defeat the trustee's title.

Assignment under a foreign bankruptcy to foreign p. 234. assignees extends to all the movable personal estate of the bankrupt in England, including *chooses in action*. It is not, however, clear that if the bankrupt's domicil be English the title of his foreign assignees will prevail against that of his personal representative on his death.

The right of the foreign assignees to sue in England p. 235. for a debt due to the bankrupt will be the same as that which would be conferred by an ordinary English assignment of the debt.

Priorities of creditors and all other questions of proof p. 237. and distribution under a bankruptcy will be governed by the *lex fori*; which will deal with creditors who have submitted to the jurisdiction by coming before the Court without regard to their domicil.

(v.) *Alienation of Movable Personal Property by Marriage.*—The last species of assignment by which personal property is transferred is that universal assignment which results from the marriage of the owner when a woman, and is absolutely regulated by the law of the matrimonial domicil—i.e., the domicil of the husband at the time of the celebration of the marriage. Story cites for this the words of Lord Meadowbank in the *Royal Bank of Scotland v. Cuthbert* (a): “When a lady of fortune having a great deal of money in Scotland, or stock in the banks or public companies there, marries in London, the whole property is *ipso jure* her husband's. It is assigned to him. The legal assignment of a marriage operates without regard to territory all the world over.” It is obvious, however, that this language is just as applicable to the *lex loci celebrazioneis* as to the *lex domicilii*, and it is extremely probable

(a) 1 Rose App. 481.

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that the learned judge was confounding the two laws, the case before him being that of an English adjudication of bankruptcy against a firm carrying on business both in Edinburgh and in London, and whose domicil for the purposes of the case was considered as being in both countries equally. The principle of the *lex domicilii*, however, is regarded by all writers as firmly established (a). The law of the matrimonial domicil is also that which is strictly applicable to marriage settlements of personal property as between husband and wife, yet this statement is not to be accepted without qualification. For example, its effect does not survive as against creditors when the husband is afterwards adjudicated bankrupt in another competent jurisdiction, but the law there in force will prevail (b). This simply follows from the general rule that in a distribution of assets in a *concursus* of creditors, the order of distribution is a matter for the *lex fori* where the distribution takes place (c); and does not at all interfere with the principle that the law of the matrimonial domicil at the time of the marriage regulates the rights which husband and wife acquire in each other's personal property. By placing himself within the reach of a foreign bankrupt law, the husband in *Thurburn v. Steward* rendered himself and his wife liable to the operation of that law upon all the rights that had become vested in them at the time of their marriage. The reverse case occurred in *Ex parte Melbourn* (d), where the matrimonial domicil was foreign, and the bankruptcy occurred in England. On the same principle that was the ground of the decision in *Thurburn v. Steward*, the wife was allowed in the case last mentioned, following the English law, to prove for a sum agreed to be settled upon her, though the law of Batavia, where the parties were domiciled and the settlement was made at the time of the marriage, rendered the contract of settlement invalid as against creditors for want of regis-

(a) Story, § 423; Westlake, § 366.

(b) *Thurburn v. Steward*, L. R. 3 P. C. 478.(c) *Per Lord Cairns*, L. R. 3 P. C. 513.

(d) L. R. 6 Ch. 64.

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tration. Nor is the law of the matrimonial domicil necessarily that which regulates the interpretation and construction of settlements of personal property made on marriage. In interpreting ambiguous or technical expressions the domicil of the parties is an element which ought to be taken into consideration (*a*), but where there is no expression of a contrary intention, a marriage settlement, like an ordinary contract, is to be interpreted according to the law of the country where it is executed (*b*). In the words of Story, the general rule is in no case more firmly adhered to than in cases of nuptial contracts and settlements—that written agreements are to be construed and enforced according to the *lex loci contractus* (*c*). In most of the cases, however, the place of the matrimonial domicil is also that where the settlement is executed, and a conflict between the two laws does not arise. Westlake says, on the same subject, that while the external and formal requisites depend generally on the place of celebration, the interpretation generally, and the legality and operation always, depend upon the domicil (*d*). In *Anstruther v. Adair* (*e*), the domicil of the parties was Scotch, and an antenuptial contract, affecting the personality which was the subject-matter of the suit, had been entered into in Scotland. In holding that the contract must be governed by the Scotch law, Lord Brougham said nothing to indicate whether that law was adopted as being the *lex domicilii* or the *lex loci contractus*, but rested his judgment solely on the ground that the intention of the parties would be defeated if the Scotch law was not followed. The intention of the parties is, no doubt, the true governing principle, if it can be ascertained, but the question is whether the law of the matrimonial domicil, or that of the place where the contract is entered into, is most likely to be in

Conflict
between *lex
loci* and *lex
domicilii*.

(*a*) *Lansdown v. Lansdown*, 2 Bligh, 60, 87.

(*b*) *Holmes v. Holmes*, 1 Russ. & My. 660; *Lansdown v. Lansdown*, 2 Bligh, 60; *Trimbey v. Vignier*, 1 Bing. N. C. 151, and *infra*, Chap. VIII. (ii).

(*c*) Story, § 276.

(*d*) Westlake, § 371.

(*e*) 2 My. & K. 513. See *Warrender v. Warrender*, 2 Cl. & F. 468; *Sawer v. Shute*, 1 Anstr. 63.

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the minds of the contracting parties. And though Westlake, in the passage quoted, refers the interpretation of marriage contracts to the law of the domicil, he elsewhere expresses a view more consistent with that taken by Story, when treating of the interpretation and construction of contracts generally (*a*). *Foubert v. Turst* (*b*), again, was a case where the place of the matrimonial domicil, at the time of the execution of the contract, was also the place where the contract was executed, and there is nothing in the decision to support either law at expense of the other. A different state of things existed in *Duncan v. Cannan* (*c*), but there the marriage contract, though prepared and signed in England, was in the Scotch form, so that the intention of the parties to be governed by the Scotch law was clearly indicated. And as Lord Justice Knight Bruce, in giving judgment, attached as much weight to this fact as to the domicil of the husband, it is hardly an authority for the law of the domicil as opposed to that of the place of the contract in cases where the forms prescribed by the latter law are adopted. In *Este v. Smyth* (*d*) the marriage contract was executed, and the marriage celebrated, in France, and the validity of the former by its terms depended upon that of the latter. The parties were English by nationality, and the marriage was celebrated at the English Embassy. Lord Romilly in effect held, that whether this was a good marriage or not by the law of France, it was good in an English Court, and that the contract (to that extent) must be construed by English rules. But as to the general rights of the parties he held that the French law must prevail, and that the contract must be expounded by it, in order that the intention of the parties might be carried into effect. Of the matrimonial domicil nothing is said in the judgment, except that the fact of the parties being *resident* in France at the time of the execution of the contract was imma-

(*a*) Westlake, § 188.

(*b*) Prec. Ch. 207; 1 Bro. P. C. 38.

(*c*) 18 Beav. 128; 7 De G. M. & G. 78.

(*d*) 18 Beav. 112.

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terial, and Westlake says of this case that the domicil was really French, and the contract interpreted by French law. So far as this is true it is obvious that the case is not an authority for the law of the matrimonial domicil as opposed to that of the place of the execution of the contracts. In *Guepratte v. Young* (a) the law of France, which was the domicil of the husband and the *locus celebrationis*, was expressly adopted by the nuptial contract.

The *dictum* of Mr. Westlake just cited, to the effect *Lex domicilii* —ousted by agreement. that the legality and operation of marriage contracts depends always upon the law of the matrimonial domicil, cannot now be accepted in its entirety, at any rate with regard to a settlement made in England in a case where the domicil of the husband only is foreign. In such a case it would seem that an English Court will be indisposed to allow the subsequent operation of the settlement to be interfered with by any act of foreign law, though that law belongs to the matrimonial domicil. Thus, where a settlement had been made in England on a marriage between a domiciled Turkish subject and an English lady, entered into on the faith of the husband's representations that he would reside in England, a divorce in Turkey was disregarded, the effect of which by Turkish law was to annul the settlement, but which had in fact been pronounced without notice to the wife or the other persons interested under the settlement (b). It cannot be said, however, that Hall, V.C., in that case expressly decided against the law of the domicil, inasmuch as he expressed himself satisfied that the husband represented to the wife at the time of the marriage that he intended to leave Turkey and come to reside as a domiciled Englishman, whether that was in reality his intention or not. It was apparently assumed that this fact was sufficient to oust the law of the husband's actual domicil altogether, and the Vice-Chancellor said that the rights of the parties claiming under the settlement must be recognised

(a) 4 De G. & Sm. 217.

(b) *Collis v. Hector*, L. R. 19 Eq. 334, 340.

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and dealt with according to English law, by which the contract, being English, was admittedly to be expounded. Regarding the contract as English, it was further said that a Turkish Court could not make void an English settlement in the absence of parties taking benefits under it. It is not quite clear whether the Vice-Chancellor intended by the expression "an English settlement" a contract that had been made in England, and nothing more, or a contract that had been made in England by a person who announced at the same time his intention of taking an English domicil ; but it is plain enough, that inasmuch as the matrimonial domicil remained as a matter of fact Turkish throughout, the decision is an authority to shew that the law of that domicil is not allowed absolutely to control a settlement made in England. Perhaps the clearest way of indicating the principle involved is that taken by Lord Romilly in an earlier case (*a*) ; where it was said, that if a foreigner and an Englishwoman make an express contract previous to marriage, and if on the faith of that contract the marriage afterwards takes place, and if the contract relates to the regulation of property within the jurisdiction and subject to the laws of this country, in such a case an English Court will administer the law on the subject as if the whole matter were to be regulated by English law. From the two cases last cited the test question appears to be, by what law did the parties intend that their rights under the contract should be governed ? In *Van Grutten v. Digby*, Lord Romilly, while admitting that foreigners—i.e., persons domiciled abroad—may enter into contracts in England to be governed exclusively by the law of their own country, held that the effect of the provisions in the particular marriage settlement then under his consideration was, that the subject-matter of it was to be regulated by English laws. So in *Collis v. Hector* the circumstance that the marriage had been entered into on the faith of a representation by the husband, that he intended forthwith to change his

(a) *Van Grutten v. Digby*, 31 Beav. 561.

domicil from Turkey to England, was considered as clearly shewing that the law of England was the proper one to regulate its effect, as it was the only one which was expected to do so. The earlier case of *Watts v. Shrimpton* (a) is less clearly indicative of regard to the intention of the parties, inasmuch as it does not appear plainly from the judgment whether the funds which were the subject-matter of the litigation were or were not comprised in the settlement, and that very question was disputed in the course of the argument. The husband's domicil at the time of the marriage was French, and the settlement was made in England, both the contracting parties being English by nationality, and under these circumstances it was held by Lord Romilly that the contract was English, and to be regulated by English law. So far as it related to property in England, there was no doubt the same reason for appealing to the English law that existed in *Van Grutten v. Digby*.

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SUMMARY.

ASSIGNMENT OF PERSONAL PROPERTY ON MARRIAGE.

Where no marriage contract or settlement is entered p. 239. into, the rights of the parties in and to each other's goods are absolutely regulated by the law of the domicil of the husband at the time the marriage takes place.

When there is such a marriage contract or settlement, pp. 241, 243. the law of the domicil is *prima facie* that which regulates its validity and interpretation; but if the place where the contract is executed is not that of the matrimonial domicil, the governing law appears to be that of the place which must be taken to have been in the contemplation of the parties, either as their intended future residence, or as the *locus* of the subject-matter of the settlement.

Even where there is no dispute as to the proper govern- p. 240. ing law, in consequence of the marriage having been

(a) 21 Beav. 97.

PART II. PROPERTY. celebrated, and the contract entered into, in the country of the domicil; yet the rights created by it will not prevail against a subsequent bankruptcy of the husband in a competent foreign court, inasmuch as the distribution of assets in a *concursus* of creditors is governed by the *lex fori* alone.

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CONTRACTS.

INASMUCH as the greater part of the contracts entered into in the transaction of the ordinary business of life relate more or less directly to *property*, of one kind or another, it has been necessary in the course of the preceding pages, while speaking of the operation of local and foreign laws upon movable and immovable property, to refer more than once to the relation to the same laws of the contracts by which such property is dealt with, and to shew that the operation of those contracts is often modified and governed by the effect of the *lex situs* upon the subject-matter with which they are concerned. The necessity of treating of the rights and capacities of *persons* has similarly given rise to a discussion, which would otherwise have been premature, of the effect which such strictly personal qualifications have upon the contracts into which the persons enter. It is nevertheless possible, theoretically speaking, to consider the subject of contracts by itself, abstracting them in theory from the persons who make them and the property which they concern. In practice it will no doubt frequently be found that the law of persons, and the law of property, arise either singly or together to compete with the law of contracts for the ultimate decision of the particular case which is the subject of inquiry; but this is a difficulty which is not confined to private international jurisprudence, and occurs with equal frequency in the investigation of ordinary municipal law. But the inevitable result must be, that

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just as, in the consideration of the claims of English law to regulate things and persons, it was not practicable to escape entirely from its operation upon contracts, so in the discussion of contract, it will be impossible uniformly to ignore the law of persons and things.

In considering the jurisdiction assumed by English law over contracts, and the extent of its right to determine and define those which come before it, the following factors must be regarded as important: (i.) The place where the contract was made, or the *locus contractus celebrationis*; (ii.) the place where the contract is to be or was to be performed, or the *locus solutionis*; (iii.) the *situs*, or situation of the property which it is intended by the contracting parties to affect; (iv.) the *status* of the contracting parties themselves; and (v.) the operation of the *lex fori* upon the remedy which the litigants seek to obtain from the English Court. The questions of *situs rei* and *status personæ* have already been discussed, and the whole subject of *remedies* will be considered when treating of Procedure (a); but it will not be practicable to keep the consideration of contract law as a whole entirely distinct from these last-mentioned branches of the subject. It is proposed to treat here of contracts from their inception to their enforcement according to the natural order in which the difficulties arising from the subject present themselves.

(i.) Jurisdiction as to Contracts.

It is not proposed to enter into the questions of jurisdiction which are peculiar to Roman jurisprudence and to the systems of those countries which are derived from the civil law. The distinctions between the *forum rei*, the *forum domicilii*, the *forum actoris*, the *forum rei sitæ*, the *forum rei gestæ*, and the *forum rei solvendæ*, are of little practical importance to the English lawyer (b), whose

(a) *Infrà*, Chap. X.

(b) They may be found discussed in Story, § 532-538; Westlake, p. 89, p. 104; J. Voet, Pandect. tom. i. lib. 5, § 77, seq.

object it is to inquire simply how far the statutory and common law powers of his own Courts extend, and over what matters they will assume and maintain jurisdiction.

The element of the English common law, which as a matter of fact prevented these questions from ever arising in its administration, was the technical rule of *venue*, which divided all actions into two exhaustive classes, *local* and *transitory*. Local actions were those connected in any way with the soil, which it was always necessary to bring in the country where the cause of action arose, and the distinction arose in the following way. By the old common law the jurors were to be summoned from the particular place or neighbourhood (*vicinatum, vicine*) where the facts happened, it being then thought highly desirable that they should be cognizant of their own knowledge (a), apart from the evidence, of the matters in dispute. It was therefore necessary, for the guidance of the sheriff in executing the writ of *venire facias*, that the pleadings should shew what the place or neighbourhood was (b), and the term "laying the venue" was given to the required allegation. But in course of time the jury began to be summoned no longer as witnesses, but as judges, to receive the facts from the testimony of others judicially examined before them (c), and the necessity of their being summoned from the *vicinatum* where the facts occurred—in other words, the necessity for that reason of the *venue* being truly laid—ceased. It was from this time that the distinction between local and transitory actions began; the former including all matters necessarily involving the idea of a certain place or part of the soil, the latter those which affected the person, or the movables which follow the person, and which might therefore have happened anywhere. With regard to local actions, it was held that if the venue alleged in the margin of the pleadings was untruly laid—i.e., if on trial the action appeared to be

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venue.

- (a) Co. Litt. by Harg. 125 a, n. (1).
- (b) *Ilderton v. Ilderton*, 2 H. Bl. 161; Co. Litt. 125, a, b.
- (c) Stephen on Pleading, 7th ed. p. 235.

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connected with the soil of some place outside the county of the *venue* as laid—the variance was fatal, and the plaintiff failed. If, on the other hand, the facts of the action were *transitory*—i.e., such as might have occurred anywhere—the fact that the *venue*, as laid, was not the place where they were actually proved to have happened, was immaterial (a). The consequence was that any contract, not directly connected with the soil, could be sued on in an English Court without regard to the place where it arose or was to be performed, if the defendant could be only rendered amenable to the Court's process, and service could be effected upon him according to its regulations.

The former practice of the Common Law and Chancery Courts differed in several essential points. At common law, personal service within the realm was necessary until 1852. The Common Law Procedure Act of that year permitted service abroad (except in Scotland or Ireland) in actions against both British subjects (s. 18) and foreigners (b) (s. 19), when there was a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction; and the Court or a judge, on being satisfied by affidavit of these facts, and that reasonable efforts were made to effect service of the writ, which had come to the defendant's knowledge, were empowered to dispense with service altogether (c). It will be seen that the limitation confining this statutory power to cases in which there was a cause of action which arose within the jurisdiction, or in respect of a breach of a contract made within the jurisdiction, may be construed in two ways: first, as confining the statutory power in respect of actions on contract to cases where the contract was made within the jurisdiction; and secondly, as including cases where the contract was made abroad, but the breach took place in England—this second con-

(a) *Mostyn v. Fabrigas*, 1 Sm. L. C. 607, and cases cited in note. So for torts to realty abroad, no action lay in England; *secus*, as to personal wrongs, *Skinner v. E. I. Co.*, cited in Cowper, 167, 168.

(b) Foreigners resident in Scotland or Ireland might be served there, though British subjects were exempt: Day's C. L. P. Acts, p. 58, n.

(c) *Binet v. Picot*, 28 L. J. Ex. 244.

struction regarding the *breach* of a contract as a "cause of action" within the meaning of the first part of the limitation. Upon this question the Courts at Westminster at first held divided views; the Queen's Bench adhering to the view that it was insufficient that the breach of a contract should take place within the jurisdiction, if the contract itself was made abroad (*a*), while the Courts of Common Pleas and Exchequer acted upon the opposite construction (*b*). In consequence of these conflicting decisions a conference of the judges was ultimately held upon the subject, and the view taken by the Court of Common Pleas in *Jackson v. Spittall* was accepted as binding once for all (*c*); so that according to this, the latest authority, a plaintiff was entitled under the Common Law Procedure Act, 1852, to serve the defendant abroad, if he could shew that the contract was either made or broken within the jurisdiction. The passing of the Judicature Acts, 1873 and 1875, introduced new law upon the subject altogether; but Ord. xi., r. 1, of the Rules of Court, in the schedule to those Acts, adopts the principle enunciated in *Vaughan v. Weldon*.

"Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a judge whenever the whole or any part of the subject-matter of an action is land or stock or other property situate within the jurisdiction, or any act, deed, will, or thing affecting such land, stock, or property; and whenever the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, was made or entered into within the jurisdiction, and whenever there has been a breach within the jurisdiction of any contract wherever made, and whenever any act or thing sought to

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(a) *Allhusen v. Malgarejo*, L. R. 3 Q. B. 340; *Cherry v. Thompson*, L. R. 7 Q. B. 573; and see *Sichel v. Borch*, 2 H. & C. 954.

(b) *Jackson v. Spittall*, L. R. 5 C. P. 542; *Durham v. Spence*, L. R. 6 Ex. 46; *Vaughan v. Weldon*, L. R. 10 C. P. 48.

(c) *Vaughan v. Weldon*, L. R. 10 C. P. 48.

PART III. be restrained or removed, or for which damages are sought to be recovered, was or is to be done or is situate within the jurisdiction."

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Jurisdiction.** By a subsequent rule (r. 4, Ord. xi.) the order giving leave for service of such writ or notice shall limit a reasonable time for appearance. It has been decided in *Swansea Shipping Company v. Duncan, Fox, & Co.* (a) that both these rules apply to the service of notice on third persons under Ord. xxI., rr. 17, 18.

**Effect of
Judicature
Acts.**

The Chancery practice, previous to the passing of the Judicature Acts, was controlled by Ord. x., r. 7, of the Consolidated Orders, which gave the Court a discretionary power (not limited to the cases contemplated by 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82) to order service of a copy of a bill on a defendant without the jurisdiction in any suit (b). The rule of court above cited will of course henceforth regulate the practice in all the Divisions of the High Court. It was held under the old practice that the power conferred by the Common Law Procedure Act, 1852, of serving "persons" abroad did not include the case of foreign corporations (c). The interpretation order, however (Ord. LXIII.) expressly provides that the word "person" in the rules shall include a body corporate or politic, so that the decision in *Ingate v. Austrian Lloyd's* must be regarded as inapplicable to the present practice, and it has been expressly decided that service can now be ordered on a foreign corporation abroad (d). It will be remarked at once that the terms of Ord. xi., r. 1, which has just been cited, are merely permissive, and not obligatory, and the question immediately arises, by what rules will the exercise of that discretion be governed? In *Hart v. Herwig* (e), a case which came before the Appeal Court of Chancery before the commencement of the

(a) L. R. 1 Q. B. D. 644.

(b) See *Drummond v. Drummond*, L. R. 2 Ch. 32, where the old law is fully discussed.

(c) *Ingate v. Austrian Lloyd's*, 4 C. B. N.S. 704.

(d) *Scott v. Royal Wax Candle Co.* L. R. 1 Q. B. D. 404; *Westman v. A. E. Snickarefabrik*, L. R. 1 Ex. D. 237.

(e) L. R. 8 Ch. 860.

Judicature Acts, it was argued that the discretion which the Court of Chancery then possessed (as explained in *Drummond v. Drummond*, *vid. supra*) should be regulated by the analogy of the common law powers conferred by the Common Law Procedure Act, 1852, and stated above. Without actually assenting to this proposition, Lords Justices James and Mellish intimated that in that particular case, inasmuch as the chattel which was the subject-matter of the suit was within the jurisdiction, the Court had power to grant an injunction against its removal, which was the relief prayed. James, L.J., however, says with regard to the general question, "I am of opinion that, according to the established law of nations, if this suit were a suit for damages only, or one which could result in damages only, then the plaintiff must, in order to enforce his claim for damages, go and seek the forum of the defendant. But where the contract, as in this case, though made abroad, is to deliver a thing *in specie* to a person in this country, and the thing itself is brought here, then the Court here, in the exercise of its discretion, will see that the thing to be delivered in this country does not leave this country, so as to defeat the right of the plaintiff to have it so delivered." In *Davies v. Park* (*a*), which was cited during the argument in *Hart v. Herwig*, the contract had been made abroad, and the defendant, whom it was attempted to serve, was also without the jurisdiction; and in discharging the order for service, Wickens, V.C., said the question was whether the defendant, the contract being a foreign one, had done anything to waive his ordinary right to be sued in the courts of that country of which he was a citizen, and where he still resided. The judgment of Malins, V.C., in *Matthaei v. Galitzin* (*b*), another case decided before the Judicature Acts, is also useful in shewing the view of the general question of jurisdiction taken by English Courts. In that case the parties, the contract, and the subject-matter were all foreign, though it does not appear from the report whether

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(a) L. R. 8 Ch. 862, n.

(b) L. R. 18 Eq. 340.

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and how service had been effected abroad, and Malins, V.C., said, "What right in such a case can there be to sue here? Can any one sue in the courts of this country in matters relating to foreign property, the contract being foreign, and both parties foreign subjects? (a) Certainly, according to my view, it is no part of the business of this Court to settle disputes between foreigners. There must be some cause for giving jurisdiction to the tribunals of this country; either the property or the parties must be here, or there must be something to bring the subject-matter within the cognizance of this Court. . . . All the cases cited go upon the same principle, and they shew that you cannot sue a foreigner in this country, unless the parties are resident here or the property is situate in this country" (b). These observations must, however, be read *secundum subjectam materiem*, the suit relating to the profits of a Russian mine, and the cases immediately afterwards referred to by the Vice-Chancellor being all connected with foreign realty (c). When the cause of action was not connected with any specific property, and arose out of a mere personal contract, it has been already seen that jurisdiction was frequently assumed by English Courts if this country was either the place where the contract was made or where it was broken—the *locus contractus celebrationis* or the *locus solutionis* (d). But where there is a foreign subject-matter, and no special circumstances exist to give the English Courts jurisdiction, it appears clear that the parties must be confined to the foreign tribunal (e). Service of a petition under the Trustee Relief Act, 1847 (10 & 11 Vict. c. 96), will, it

(a) The parties were really domiciled abroad, and it does not appear that any reliance has ever been placed on the point of *nationality*, so that the expression "*British subjects*" was probably used inadvertently; especially as it appears that the intestate of the plaintiff, who sued as administratrix, was a naturalized British subject.

(b) *Matthaei v. Galitzin*, L. R. 18 Eq. 347; *Cookney v. Anderson*, 31 Beav. 466; 1 D. J. & S. 365.

(c) *Vid. supra*, pp. 120–138.

(d) *Ante*, p. 250.

(e) *Doss v. Secretary of State for India*, L. R. 19 Eq. 509, 535; *Matthaei v. Galitzin*, L. R. 18 Eq. 340; *Re Holmes*, 2 J. & H. 527; *Blake v. Blake*, 18 W. R. 944.

seems, be permitted in any case, without reference to the local situation of the subject-matter of the trust (*a*).

So far, then, it is difficult to see what limitation is to be placed upon the exercise of the discretion in assuming the foreign jurisdiction which is conferred by Order xi., r. 1. It has been seen that it will be exercised in respect of contracts either made or broken here, or concerning movable or immovable property situate here. The case of two domiciled Englishmen, contracting abroad for something to be performed there, does not seem to have arisen, and is not included in the rule, as the service of a writ, with which that rule is concerned, would not of course give rise to any question as to the *locus* of the contract, if the defendant was in England. Even transient presence, however, within the jurisdiction, has always been held sufficient to entitle the Court to proceed in any matter (*b*) that was not concerned with foreign realty, or otherwise required a local venue abroad, and *à fortiori* the fact that the defendant was domiciled in England would give the Court jurisdiction in such matters, if he could be served with the writ here. Whether the mere fact that the defendant had his domicil here would give jurisdiction in cases where the cause of action was foreign, so as to enable the Court to order service abroad, is a question which does not appear to have come before the Court of Chancery before the Judicature Act, when the discretion of that Court was undefined and unfettered by statute. The Common Law Courts could of course only act under the statutory provisions enabling them to do so (C. L. P. Act, 1852, s. 18), just as all the Divisions of the High Court are now limited to the cases mentioned in Order xi. of the Judicature Acts; and in neither of these statutory enactments is the supposed case included.

The restriction arising from the necessity of a local venue, in actions concerning foreign realty, has now been abolished by the rules of venue.

(*a*) *In re Haney's Trusts*, L. R. 10 Ch. 275, and cases there cited. As to service in probate actions (Ord. xi., r. 2) see *Beddington v. Beddington*, 34 L. T. 366.

(*b*) See note to *Mostyn v. Fabrigas*, 1 Sm. L. C. 658.

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abolished by the Judicature Acts (Sched. Order XXXVI., r. 1), and it would seem no longer controls the jurisdiction of the High Court. *Whitaker v. Forbes* (a) was a case in which the Judicature Acts did not apply, inasmuch as it was commenced before their operation, though argued in the Court of Appeal after that date, and in giving judgment, Cairns, L.C., suggested the probability that the alteration in the law of venue introduced by the Judicature Acts might extend the jurisdiction to some actions which the Courts under the old law had no power to entertain. That was an action for a rent-charge issuing out of land in Australia, as to which the authorities cited to shew that the venue was local were conclusive (b), and the decision proceeded therefore strictly upon the technical ground that an action in which the venue was local could not be maintained here unless that venue could be laid within the jurisdiction. The observations of Lord Cairns were afterwards referred to in a case commenced under the Judicature Acts, and to which the new rules abolishing venue therefore applied. The claim stated that the Plaintiffs and defendants were each of them limited companies with registered offices in London, and that the action was brought for rent of a railway station in Buenos Ayres (into possession of which the defendants were put by the plaintiffs), and for part of the cost of constructing lines of railway and approaches to the station (c). The distinction as to venue no longer existing, it was not directly decided that the case in question was local, and that the Judicature Acts had therefore actually enlarged the jurisdiction; but it appeared to be assumed that it would be insufficient to oust the jurisdiction of the Courts to shew merely that the rules of venue would formerly have prevented the action from being brought. The litigant companies both being English corporations by statute, with registered offices in London, no difficulty had arisen with

(a) L. R. 1 C. P. D. 51.

(b) *Thomas v. Sylvester*, L. R. 8 Q. B. 368.

(c) *Buenos Ayres and Ensenada Port Ry. Co. v. Northern Ry. Co. of Buenos Ayres*, L. R. 2 Q. B. D. 210.

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respect to the service of the writ ; and the only question argued was, whether the fact that the railway and premises were situate in Buenos Ayres, and that the Argentine Republic had assumed jurisdiction over the plaintiffs' claim, was sufficient to prevent an English Court, according to the comity of nations, from taking cognizance of it. It was held insufficient, on the ground that no exclusive jurisdiction belonged to or had been assumed by the Courts of the Argentine Republic, and that the law of nations did not restrain a tribunal here from dealing with a contract properly brought before it, by reason of its relating to immovable property situate in a foreign country. There are in fact two stages of any action at which the defence that the contract to which it relates is a foreign one may be raised. It may be raised either by opposing the application for leave to serve the writ abroad, when the defendant is not in England, or on the pleadings by demurrer (a). It may also of course be left for argument upon motion for judgment, or otherwise after verdict, but the question so raised will be exactly the same as that involved in the demurrer. First, as to the service of the writ, it has been already shewn that the discretionary power of the Courts is limited and conferred by Order XI., r. 1, of the Rules of the Supreme Court ; and it is submitted that the discretion exercised under that Order by a judge at Chambers should refuse leave to serve abroad even in cases where the facts are strictly within the terms of the Order, if it is clear that the jurisdiction of an English Court does not properly extend to the subject-matter. In other words, it should be governed by the same rules as those recognised and followed by the Court of Chancery before the Judicature Acts came into operation. Secondly, with regard to the cases in which the defence may subsequently be raised upon the pleadings, that course was adopted as the most suitable one in *Buenos Ayres and Ensenada Port Ry. Co. v. Northern Ry.*

(a) See, however, *Preston v. Lamont*, L. R. 1 Ex. D. 361.

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Co. of Buenos Ayres (*a*), but in *Preston v. Lamont* (*b*) a defence substantially objecting to the jurisdiction was struck out on the ground that the question was one for Chambers. It should be noticed, however, that in the case last cited part of the statement of defence which was disallowed was virtually a denial that the facts of the case came within the terms of Order XI., r. 1, at all, so that the judge's order for service beyond the jurisdiction was alleged to have been wrongly made; and there can be little doubt that many cases may arise, in which, though Order XI., r. 1, is strictly applicable, the general principles of law and the comity of nations would direct an English tribunal to decline jurisdiction. Such, for example, are obviously those actions in which it is attempted to try the title to or the right to the possession of foreign realty, with regard to which it has been shewn above (*c*) that the Court of Chancery never assumed jurisdiction to act directly upon foreign land, but only indirectly through the consciences of its own justiciables. The rules of Chancery on this point being based on the principles of the law of nations (*d*), and having nothing to do with the common law technicalities as to *venus*, remain unaltered by the Judicature Act, being only modified at the stage of the service of the writ of summons, by the additional limitations imposed and defined in Ord. XI., r. 1.

SUMMARY.

JURISDICTION ON CONTRACTS.

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The jurisdiction of English Courts to deal with contracts in which a foreign element existed was originally based on rules of practice alone; and the distinctions made by Roman law between the *forum actoris*, the *forum rei*, and the *forum rei sitæ, rei gestæ, or rei solvendæ*, were

(a) L. R. 2 Q. B. D. 210.

(b) L. R. 1 Ex. D. 361.

(c) *Suprà*, pp. 121, 127.(d) Except so far as they may be said to be at variance with it. See Story, § 544, and *suprà*, p. 136.

ignored. The test of *venue*, provided that personal service could be effected on the defendant within the realm, was the only one applied in the Common Law Courts ; whilst the Court of Chancery, which was unrestricted by the rules of *venue*, had a discretionary power of ordering service without the realm in any suit. Actions for the possession of foreign immovables were excluded from all Courts ; from the Common Law Courts by the rules of *venue*, and from the Court of Chancery on principle.

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The Common Law Procedure Act, 1852, gave a similar power of ordering foreign service to the Common Law Courts, where the cause of action arose within the jurisdiction, or in respect of a breach of a contract made within the jurisdiction ; a provision which was, after a judicial conflict, construed to include the case of a contract made abroad, but broken within the realm.

The provisions of the Judicature Acts, 1873 and 1875, give a similar discretionary power of ordering foreign service (a.) where the subject-matter of the action is land stock or property situate within the jurisdiction, (b.) in all actions on contracts made within the jurisdiction, or (c.) of which there has been a breach within the jurisdiction, wherever they were made, (d.) in actions touching any act or thing done, to be done, or situate, within the jurisdiction. If the action does not fall under one of these heads, the mere English domicil or nationality of the contracting parties will not enable foreign service to be ordered. The restrictions arising from the rules of *venue* are abolished altogether.

Notwithstanding the abolition of *venue*, actions for the possession of or property in foreign immovables will not, it would seem, be now entertained, any more than they could have been in the Court of Chancery under the old practice. The mere fact, however, that a contract relates to foreign immovables will not restrain an English Court from dealing with it ; and the Court of Chancery will of course indirectly affect foreign immovables by acting *in personam*, as heretofore.

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(ii.) *Law by which the Contract is governed.*—The *lex contractus* has always been an ambiguous term, which jurists have interpreted either as the *lex loci celebrationis* or *solutionis*, the law of the place where the contract was entered into, or of that where it was to be performed, according to the tendency of their peculiar views. A little consideration will shew, that, assuming that the parties entering into the contract are of full capacity to do so by every law, and that no law is transgressed or intended to be transgressed by the subject-matter of their agreement, their will is or should be absolutely unfettered. They should in theory be able to contract themselves out of or into any law they please, and the only question for a tribunal called upon to enforce the contract should be, by what law did the parties intend that their rights should be defined and governed? According to this reasoning, the intention of the parties should be deferred to when interpreting and enforcing a contract in all respects except two, the question of their capacity to contract, and the question of the legality of that for which they have contracted. An examination of the cases in detail will shew how far these theoretical principles have been adopted.

*Capacity
governed by
lex loci.*

(a.) *Capacity to contract.*—With regard to the capacity to contract, which is generally regarded as the natural consequence of adult age, it has been said above (a) that the English authorities, as far as they go, are unanimous in saying that the *lex loci celebrationis*, the law of the place where the contract is entered into, has alone the right to make its voice heard. On such a matter the question of intention can obviously have no weight, and the limit of age, which the English law has imposed for the benefit and protection of its own subjects, must be conclusive within the limits of its jurisdiction. It would clearly be inequitable, for example, that a domiciled subject of Prussia or of some other continental State which regards legal majority as postponed until the age of twenty-

(a) *Suprà*, p. 31; *Male v. Roberts*, 3 Esp. 163.

five, should attempt to evade the performance of a contract entered into in England when he was twenty-four by the plea of infancy. The reverse case of an Englishman at the age of twenty-four making a contract in Prussia, and afterwards repudiating it on the same plea, has not occurred; but the other party to the contract, who would almost inevitably be Prussian by nationality or domicil, would necessarily be taken to know his own laws; and though he might complain that he had been defrauded, could not deny that the fraud ought to have been foreseen. It is of course possible to imagine the case of two Englishmen transiently present in a country whose law regarded them as infants, although both had passed the English limit of twenty-one years, and there entering into a contract in ignorance or in contempt of the provisions of the *lex loci*. No English Court has been called upon to decide upon the validity of a plea of infancy offered under such circumstances, and it is difficult to think that it would be allowed to prevail. In *Dalyrymple v. Dalyrymple* (a), Sir W. Scott said that it was an indispensable rule of law as exercised in all civilized countries, that a man who contracts in a country engages for a competent knowledge of the law of contracts in that country.

Nevertheless, until the recent decision in *Sottomayor v. De Barros* (b) on appeal, authority was wanting for holding that the law of the domicil of the parties would in such a case be referred to. It must be confessed that there are *dicta* in that judgment which go far towards unsettling the view hitherto attributed to English law on this question (c), and towards adopting the theory maintained by so many of the older jurists, that the personal law of domicil confers a capacity or imposes an incapacity which will follow the person into any other country (d). That was a case which turned upon the so-called capacity of two domiciled Portuguese, who being first cousins were

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(a) 2 Hagg. Cons. 61.
(b) 37 L. T. 415.

(c) See authorities cited *suprà*, p. 31.
(d) *Suprà*, p. 29.

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forbidden to marry by Portuguese law, to contract marriage in England; and the Court of Appeal held that the law of Portugal must prevail. It had been decided by Sir R. Phillimore in the Court below, following the stricter precedents of English law, that the law of England, the place where the contract of marriage was entered into, had been satisfied, and that the marriage was consequently valid. The case, however, was one in which considerations of natural humanity and pity called for a dissolution of the union, and the Court of Appeal, consisting of James, Baggallay, and Cotton, L.J.J., reversed his decision. There appears to have been no argument on the question of capacity generally, nor is it considered in the judgment with reference to anything but marriage, but the judgment does state it to be "a well-recognised principle of law" that the question of personal capacity to enter into any contract is to be decided by the law of domicil. How far this *dictum* can be regarded as applicable to that incapacity which arises from minority it may be difficult to determine; but if, with regard to that incapacity, it is "a well-recognised principle of law" that the law of domicil is to exclude the law of the place of contract, it has become so since Story wrote (a), and since Lord Eldon sat at Nisi Prius.

Contract of
marriage—
characteris-
tics of.

It is in truth an error to regard the so-called contract of marriage as something to be governed by the ordinary rules which the law of contract embodies; and the capacity to enter into the marriage contract may be regarded quite logically as entirely distinct from that capacity to contract, in the ordinary sense of the word, to which the *dictum* of Lord Eldon in *Male v. Roberts* referred. The question of the capacity of a man and woman to marry, and of the consequent validity of their marriage, is one which essentially concerns the law of their domicil, because it is in the country of the matrimonial domicil that they intend to spend their married life. This is a

(a) Story, § 103; Burge For. Law, i. c. 4, p. 182; Westlake, Priv. Int. Law, § 401; *Male v. Roberts*, 3 Esp. 163.

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necessary conclusion, because, if they intend to spend their married life in any other place, and have married in any place in which they are not domiciled, they have, in fact, quitted their domicil without an *animus revertendi*, and lost it or changed it for another. And if the acquisition of a new domicil has not been so complete as to divest them of the old, then, in the eye of the law, they *do* intend to return to the man's original domicil or home. It being therefore clear that the country of the matrimonial domicil must be taken as the place where the man and woman intend to spend their married life, it follows that the law of that country, and of no other, is the law to which the validity, legality, or morality of their marriage, is a matter of concern (*a*). It is true that this argument, if stretched, would almost go to the length of excluding the law of the place of celebration with respect to the forms and solemnities of the ceremony; but it will be shewn hereafter (*b*) that these matters are universally referred to the *lex loci celebrationis*, for the purpose, if for no other, of securing that the formalities necessary to bind the parties shall be duly performed in the sight of the only law which has at the moment of celebration the right to control them. Further, all that the principle of the interest of the law of the matrimonial domicil is cited for here, is to shew that there is at any rate one important distinction between the considerations applicable to the so-called contract of marriage, and a contract in the ordinary commercial sense. The only marriage contract which belongs to this latter class is the marriage contract by which husband and wife dispose of their rights in each other's property, a subject which has already been treated of (*c*). And there is another distinction between contracts of commerce and contracts of marriage, closely connected with the former one, and arising out of it. It is true that husband and wife enter into an agreement, just as vendor and purchaser

(*a*) "Locus matrimonii contracti non tam is est, ubi contractus nuptialis initus est, quam in quo contrahentes matrimonium exercere voluerunt."—*Huber, Confl. Leg.* i. tit. 3, s. 10.

(*b*) *Infrà*, p. 275.

(*c*) *Ante*, p. 239.

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do, by which they mutually bind themselves to do something in consideration of the mutual promises then made, but there the analogy ends. The fulfilment or non-fulfilment of the promise of vendor and purchaser, for example, is a matter which is of no public interest whatever; and that either party, on making default, should plead such defences as infancy or the Statute of Limitations, is an evil by which no one is legally or even morally wronged but the other party to the agreement. The public, or society (by whichever name the same thing is called) suffers no injury at all, except in the sense that an injury to the individual is an injury to the State, and is therefore prevented, as far as possible, by the law. On the other hand, it is of the greatest moral and social importance to the public interests of every country, for reasons which need not be specified, that those persons who live together within its limits in what they call matrimony, should be married in fact. It cannot be said that the breach or repudiation of a contract within a town is a social or public evil in at all the same sense that the illegitimate connection of the sexes is so; and at any rate, the breach of a contract is no more a public evil in the place where it is broken than in the place where it was made, in the frequent cases where the contracting parties are not both resident or even present in the place of performance. The crowning anomaly which results from the attempt to regard marriage as a contract in the legal sense of the term is to be found in the fact that it is a contract, if a contract at all, for the breach of which no action can lie, and no damages be recovered (*a*).

The considerations urged above are perhaps the most obvious reasons why the principles, which the Court of Appeal have decided in *Sottomayor v. De Barros* (*b*) are proper to decide the question of the capacity of the parties to a marriage, should not be extended, as some passages of the judgment in that case seem to imply they might be,

(*a*) The breach of a promise to marry is obviously a different thing.

(*b*) 37 L. T. Rep. 415.

to the question of the capacity of the parties to a commercial contract. What the capacity to marry, or to marry a particular person, really is, will be best seen by reviewing the decisions on the subject, of which *Sottomayor v. De Barros* is the last.

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The first case of any importance in which the question of the capacity of the parties to a marriage appears to have arisen in an English Court, was that of *Ruding v. Smith* (a), argued in the Consistory Court of London before Lord Stowell in 1821.

Capacity to
marry—cases.
Ruding v. Smith.

Smith (a), argued in the Consistory Court of London before Lord Stowell in 1821. The marriage in this case had been celebrated at the Cape of Good Hope, by the chaplain of the British forces then in occupation of the colony, between British subjects, whose domicil must be assumed to have been British also. The Dutch law at that time was the only established law in the colony, and its continuance had been formally sanctioned, so far as the inhabitants were concerned, by the capitulation. Two objections were taken to the marriage, though scarcely distinguished in the argument; first, that the mere formalities required by the Dutch law as the *lex loci celebrazioneis* had not been complied with, and secondly, that the parties were not, according to the same law, of an age at which a marriage could be contracted at all without the consent of parents and guardians, which had not been obtained. Lord Stowell held that the English law was to prevail on both points on the exceptional ground that the country was under British legal dominion, except so far as the capitulation sanctioned the continuance of certain privileges to the conquered, and that the marriage in question had been celebrated between British subjects with the countenance of British authority and British ministration. It may almost be said that Lord Stowell's judgment amounted to a decision that under the peculiar circumstances of the case (b), and between those parties, the *lex loci* was British, and therefore coincided with the *lex domicilii*. But the second question, being almost identical with that which arose in *Sinonin v. Maillac*

(a) 2 Hagg. Cons. 371.

(b) *Vid.* 2 Hagg. Cons. 390.

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forty years later, would have raised, if the *lex loci* for those parties had been held to be Dutch, a direct conflict between the *lex loci* and the *lex domicilii* on the question of capacity; and it is therefore interesting to see how Lord Stowell treated it by anticipation. Assuming a case of a marriage in Holland between British subjects domiciled in England, he asks whether an English Court would hold it void because the Dutch law referred to above imposed on the parties an incapacity to enter into it? and intimates a clear opinion that the requirements of the Dutch law would not in such a case be deferred to here (a). It is nevertheless plain that the two questions of the formalities of celebration and the capacity to celebrate were not at that stage of his decision clearly separated in his mind, inasmuch as after referring to the cases decided on the mode of celebration, he expressly guards himself against being supposed to accept Huber's doctrine as to personal capacity impressed once for all by the domiciliary law. "I do not mean to say, that Huber is correct in laying down as universally true, that '*personales qualitates, alicui in certo loco jure impressas, ubique circumferri, et personam comitari*'—that being of age in his own country, a man is of age in every other country, be the law of majority in that country what it may." It can hardly be doubted that what the Court of Appeal in *Sottomayor v. De Barros* (b) declared to be a "well-recognised principle of law" with regard to capacity, was not recognised as established by Lord Stowell in 1821.

*Conway v.
Beazley.*

In *Conway v. Beazley* (c) (1831) it was decided, according to the head-note, that the *lex loci contractus* will not prevail when either of the contracting parties is under a legal incapacity by the law of the domicil. Dr. Lushington, in his judgment, confined himself to the case of the same domicil being common to both man and woman, and no light is therefore to be gathered from his decision upon the question, as to which there is obviously room

(a) At p. 389.

(b) 37 L. T. 415, 416.

(c) 3 Hagg. Eccl. 639.

for argument, whether the law of the husband's domicil would be followed in opposition to that of the wife, in a case (for example) where her law forbade, and his permitted the marriage, or *vice versa*. In comparing the personal capacity or incapacity to marry to the *status* of legitimacy which was so fully discussed in *Doe d. Birr-whistle v. Vardill* (*a*), Dr. Lushington undoubtedly went far towards laying the foundation of the decision in *Sotto-mayor v. De Barros*. It should nevertheless be remembered that the "capacity to marry," which was in question in *Conway v. Beazley*, was simply dependent upon the answer to be given to the inquiry whether the husband was or was not already married at the time of the marriage which it was sought to annul; and it was conceded that he was already married at that time, unless a Scotch divorce was to be held, in the eye of the English law, competent to dissolve a marriage previously celebrated in England (*b*).

Neither of the above cases appears to have been cited in the case of *Sinonin v. Maillac* (*c*), and the question of the conflict between the *lex loci* and the *lex domicilii* as to capacity was there treated by Sir Cresswell Cresswell almost if not quite as a case of the first impression. The marriage which it was there sought to dissolve was one celebrated in England between French subjects domiciled in France, without the formal consents required at their respective ages by French law. In the judgment delivered after deliberation there is again authority directly opposed to the *dictum* of the Court of Appeal in *Sotto-mayor v. De Barros* (*d*), that it is a "well-recognised principle of law, that the question of personal capacity to enter into any contract is to be decided by the law of domicil." Sir Cresswell Cresswell certainly did not recognise it in 1860, as he says, "*In general the personal com-*

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(*a*) 5 B. & C. 438.

(*b*) *Lolley's Case*, Russ. & Ry. 237: *McCarthy v. Decatx*, 2 Russ. & My. 614; *Warrender v. Warrender*, 2 Cl. & F. 550; and *suprà*, p. 59.

(*c*) 2 Sw. & Tr. 67.

(*d*) 37 L. T. 415, 416.

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potency or incompetency of individuals to contract has been held to depend upon the law of the place where the contract was made. But it was and is contended that such rule does not extend to contracts of marriage, and that parties are with reference to them bound by the law of their domicil. This question, of so much importance in all civilized communities, has been largely discussed by jurists of all nations, but they all apply their observations to controversies arising, not in the countries where the marriage was celebrated, but in other countries where it is brought in dispute, and of which the parties were domiciled subjects" (a). The conclusion which Sir Cresswell Cresswell came to, after examining such authorities as were cited before him, was that the *lex loci* must prevail in this as in other cases of contract, and that the fact that the parties were forbidden by their domiciliary law to marry without the consent of certain other persons afforded no ground for a decree of nullity.

*Brook v.
Brook.*

Following almost immediately upon the case last referred to came that of *Brook v. Brook* (b), which was carried to the House of Lords in 1861, and gave rise to a discussion by the highest legal authority of the question now under consideration. The marriage in that case was that of a widower with his deceased wife's sister, both the parties being domiciled in England, but having gone to Denmark for the purposes of the ceremony. Such marriages are prohibited by English law (5 & 6 Will. IV., c. 54) (c), but are valid by the law of Denmark. It was held by the House of Lords that on such a matter the law of the domicil must prevail, and that the marriage was void. The judgment of Lord Campbell (Lord Chancellor) was put upon the ground that the *essentials* of a marriage contract were to be regulated by the *lex domicilii*, the *forms* by the *lex loci*. The question arises upon this, whether

(a) See *Scrimshire v. Scrimshire*, 2 Cons. 395; *Middleton v. Janverin*, 2 Cons. 437; *Compton v. Bearcroft*, 2 Cons. 444, cited by Sir Cresswell Cresswell in his judgment.

(b) 9 H. L. C. 193.

(c) Previously to this statute marriages of persons within the prohibited degrees of affinity were voidable only.

the capacity or incapacity to marry is to be regarded as a form or an essential? It will be further necessary to seek for a definition of capacity, that it may be seen whether the employment of that term in *Sottomayor v. De Barros* was strictly correct or not in a logical sense.

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Capacity is obviously in theory a quality—one of those *qualitates personales impressæ* of which Huber speaks—and may be taken as equivalent to a legal power of doing an act which can admittedly be done by some persons. If the act to which the capacity is referred cannot legally be done at all, it is a misuse of words to speak of a legal capacity or incapacity to do it. Speaking in this strict sense, capacity is only remarkable by its absence—it is invariably some *incapacity* that characterizes the exceptional case of which the law is called upon to take notice. Full capacity, in short, is the ordinary *status* or condition of mankind, which can never give rise to criticism or remark; and the only (*a*) logical incapacities which exist in English law are those occasioned by infancy and insanity. A law which purports to impose a *general* incapacity does not impose an incapacity at all; it simply prohibits an act. No man can marry his deceased wife's sister by English law, and therefore no man can properly be said to be under an incapacity to do so. It is remarkable that, in accordance with this view, the word "capacity" does not actually occur throughout the whole of Lord Campbell's judgment in *Brook v. Brook*, though it was made the foundation stone of the decision of the Court of Appeal in *Sottomayor v. De Barros* (*b*).

Leaving out of consideration therefore, for the present, the word "capacity," it will be well to consider what are the *essentials* of the marriage contract to which the judgments in *Brook v. Brook* referred. It will be seen on an examination of that case that the only "essential" alluded to was the relation to each other of the parties to the mar-

(a) Since the abolition of slavery. The *status* of a slave formerly involved *incapacities* in the strictest sense of the word.

(b) 37 L. T. 415.

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riage, and the decision of the House of Lords amounted simply to this, that the law of the domicil is the proper law to say whether the *relation between the suggested husband and wife* is such that a marriage between them can be permitted or recognised. If the domiciliary law holds that a marriage between persons so connected is incestuous or in any other way unlawful, the law of every other country is bound to accept its decision with regard to all persons whose domicil renders them subject to it (a). This is the decision in *Brook v. Brook*, but it must not be strained to extend to cases which it does not naturally cover. The domiciliary law must absolutely forbid such marriage, not merely place an impediment in the way of its being contracted. To say, for example, as in *Sinonin v. Maillac* (b), that parties under a certain age shall not marry without the consent of certain other people, is neither to define a natural incapacity (as is done by a law which fixes a given age as the period of infancy for its subjects), nor to declare that a particular sort of marriage is incestuous or unlawful. It is merely the addition of a ceremonial form, the construction of an artificial impediment. On the other hand, where the law of the domicil forbids a marriage between first cousins, as in *Sottomayor v. De Barros*, and declares such to be absolutely unlawful, that amounts to a prohibition against the contracting of such a marriage at all, and is a very different thing from a direction as to the manner in which it may be contracted effectually. The laws of other countries are bound to recognise a prohibition addressed by a domiciliary law to its own subjects, but not to follow its directions for performance. It may be added, that this distinction is not affected by the fact that in *Sottomayor v. De Barros* the Portuguese law would have consented to its own effacement, if a dispensation from the Pope had been obtained. Dispensa-

(a) Inasmuch as the wife's domicil becomes the husband's upon the marriage, it is the law of his domicil, not hers, which must in all cases be looked to. This appears a necessary conclusion, but there is no express decision : *vid. suprà*, p. 266.

(b) 2 Sw. & Tr. 67.

tion with a law is in principle a very different thing from compliance with its directions, though in practice the effect of the two may sometimes be similar. In such a case as *Sotomayor v. De Barros*, the law of Portugal does not say that when first cousins wish to intermarry, they shall obtain the written consent of the Pope to their doing so. It says they shall not marry at all, and such a prohibition by a domiciliary law is not the less complete, as far as other tribunals are concerned, because the same domiciliary law, under certain circumstances, allows itself to be dispensed with.

The distinction which it has been attempted in the *Steele v. Braddell*. preceding paragraph to draw between a prohibition of an act, and a direction as to the manner in which it must be performed, is supported by the Irish decision of *Steele v. Braddell* (*a*), referred to with approval by Lord Campbell in *Brook v. Brook*. By the Irish Marriage Act (9 Geo. II. c. 11) it is enacted that all marriages, when either of the parties is under the age of twenty-one, contracted without the consent of the father or guardian, shall be absolutely null and void to all intents and purposes. In *Steele v. Braddell* the marriage was celebrated in Scotland, and the husband, a minor, had not obtained the required consent. A suit was thereupon brought without success by his guardian in the Irish Court to annul the marriage, on the ground that the statute created a personal incapacity in its domiciled subjects to contract marriage while minors, in any place, without the consent stipulated for in the enactment. "This," says Lord Campbell (*b*), "was a marriage between parties, who with the consent of parents and guardians might have contracted a valid marriage according to the law of the country of the husband's domicil, and the mode of celebrating the marriage was to be according to the law of the country in which it was celebrated. But if the union between these parties had been prohibited by the law of Ireland as 'contrary to the law of God,' undoubtedly the marriage would have been dissolved. Dr. Radcliff

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(*a*) Milw. Ecc. Rep. (Ir.) p. 1. (*b*) *Brook v. Brook*, 9 H. L. C. 216.

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expressly says that it cannot be disputed that every State has the right and power to enact that every contract made by one or more of its subjects shall be judged of, and its validity decided, according to its own enactments and not according to the laws of the country wherein it was formed." (How far this latter *dictum* may be regarded as applicable to contracts in the ordinary sense of the word has been considered above (a).) On the same principle it is clear that the provisions of the English Marriage Act (26 Geo. II. c. 33), as to the previous consents required to render the marriage of minors valid, were not intended to apply to marriages celebrated out of England, any more than the other provisions in that Act as to the necessity for banns or license. The Act, in Lord Campbell's words, did not touch the essentials of the contract, or prohibit any marriage which was before lawful. It dealt with formalities and celebration alone (b). There is, it is true, one description of prohibition of marriage absolutely which is conceivable, and would amount, did it exist, to an assumption by the law to create an incapacity in the proper sense. It has been suggested that the effect of attainder is to incapacitate the attainted person from contracting a valid marriage at all; but however the law of some foreign countries may regard the attainder of their subjects, it has been decided, first, that attainder by English law does not create even an incapacity to marry in England; and secondly, that even if it did so, it would not, except by express enactment to that effect, claim any extra-territorial effect, so as to prohibit the marriage of the attainted person abroad (c). It is quite clear that whatever claim might be made by the law of a particular country in this respect, it could be entitled to no international or extra-territorial recognition whatever, on the double ground that political offences are ignored altogether in non-domestic tribunals, and that a law which imposed

(a) *Ante*, pp. 263, 264.

(b) *Brook v. Brook*, 9 H. L. C. 215.

(c) *Kynnaird v. Leslie*, L. R. 1 C. P. 389.

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an absolute incapacity to marry at all must be opposed to the public policy of every civilized community.

The examination of the foregoing cases on the question of the capacity to contract a marriage, taken in conjunction with authorities cited above (a) as to the capacity to contract in a commercial sense, shews, it is submitted, that the decision of the Court of Appeal in *Sottomayor v. De Barros* (b) accorded in substance with the authority of precedents, but was expressed in terms not warranted by that authority, and involved *dicta* directly opposed to it. "None of the cases cited," said Lord Campbell in *Brook v. Brook* (c), "can shew the validity of a marriage which the law of the domicil of the parties condemns as incestuous, and which could not, by any forms or consents, have been rendered valid in the country in which the parties were domiciled." It is submitted that that is the only principle upon which *Sottomayor v. De Barros* should have been decided.

The prohibitions of the Royal Marriage Act have been before alluded to, and inasmuch as they forbid certain marriages without the previous consent of the reigning Sovereign under the Great Seal, clearly ought in principle to be regarded as only imposing an additional formality, which the law of another country would not be justified in requiring when the marriage was celebrated within its jurisdiction. So far as the laws of foreign States are concerned, there is no difference in theory between the consent of a parent or guardian, and the consent of the reigning Sovereign under the Great Seal. But so far as the law of England is concerned, it is clearly competent for it to say that it will regard certain marriages as invalid, wherever celebrated. It cannot compel, or even expect, other States to adopt its view, but it can and does assert its own intention to take it. It can, that is, and does, impose a personal incapacity on the members of the royal family, by declaring that it will act upon the supposition

(a) *Ante*, pp. 31, 262.

(b) 37 L. T. 415.

(c) 9 H. L. C. 218.

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that such an incapacity has been imposed. In accordance with this view the House of Lords decided in the *Sussex Peerage Case* (a) that the provisions of the Royal Marriage Act extended to marriages celebrated out of England, and that the law would not allow its object and intention to be defeated. It is noteworthy that in the opinion of the judge in that case the same distinction is drawn between the essentials and the formalities of a marriage contract, the prohibitive and the directory part of the enactment, that has already been shewn to be deducible from *Brook v. Brook* (b) and its cognate cases.

SUMMARY.

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p. 262.

The capacity to contract in the ordinary sense of the word, and the so-called capacity to enter into a contract of marriage, are decided by different considerations, and governed by different rules.

pp. 260, 261.

The law of the place where the contract is entered into, the *lex loci celebrationis*, is, in common cases of contract, the law which must decide the capacity of the contractors. [Except so far as the *obiter dicta* in *Sottomayor v. De Barros* (c) on appeal may be considered as establishing the supremacy of the *lex domicilii*.]

pp. 265-273.

In the contract of marriage, the question strictly speaking is generally not one of the capacity or incapacity of the parties, but of the legality or illegality of the marriage.

The law of the matrimonial domicil is the proper law to decide whether the marriage can, by the use of any forms, ceremonies, or preliminaries, be effected.

The law of the place of celebration is the proper law to decide what forms, ceremonies, or preliminaries, shall be employed.

If the law of the matrimonial domicil is such that the

(a) 11 Cl. & F. 85; and see *ante*, p. 57.

(c) 37 L. T. 415.

(b) 9 H. L. C. 193.

marriage cannot be effected by obeying its directions, but can be effected by obtaining a dispensation from its prohibitions, the marriage cannot, in the absence of such dispensation, be legalized by the law of the place of celebration.

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The law of any country may, and the English Royal p. 273. Marriage Act does, not only prohibit certain persons from contracting marriage in England except on prescribed conditions, but refuse to recognise any marriage contracted by such persons elsewhere when those conditions have not been complied with.

(b.) *Formalities and Legality of the Contract.*

The capacity of the parties to a contract having thus been determined, the question next arises, by what law the formalities and ceremonies of the contract are to be regulated? It has been already shewn that the rule with respect to the contract of marriage is that the *forms* must depend upon the *lex loci celebrationis* alone (*a*) ; and it is undoubted that this is only a consequence of the general principle which applies to contracts generally, of whatever nature and wheresoever celebrated. The formalities and ceremonies which the law of the place of celebration demands for the constitution of a contract are to be tested by that law alone ; and if they satisfy it, no other law has a right to demand more, or in the other event, to accept less (*b*). So far as regards the formalities of contracts, the maxim of the civil law "*locus regit actum*," is, with one exception more apparent than real (the transfer of immovables (*c*)), adopted by the law of England. The point where a conflict of law does nevertheless arise is the distinction between the requisite formalities of celebration, and the requisite proof that the contract was

Forms of
contract—
lex loci.

(*a*) *Ante*, p. 48 ; *Brook v. Brook*, 9 H. L. C. 193.

(*b*) *Benham v. Mornington*, 3 C. B. 133 ; *Burge, For. Law*, vol. i. p. 29 ; *Story, Conflict of Laws*, §§ 260, 262 ; *Leroux v. Brown*, 12 C. B. 801 ; *Warrenden v. Warrenden*, 9 Bligh, 110, *per Lord Brougham*.

(*c*) *Ante*, p. 152, *infra*, p. 282.

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Essentials and remedy—
distinction between.

duly celebrated, between the creation of the obligation and the evidence of its existence, between the origin of the liability under the *lex loci* and the procedure required for the remedy by the *lex fori*. This conflict was well indicated in *Huber v. Steiner* (*a*) by Tindal, C.J. "The distinction between that part of the law of the foreign country, where a personal contract is made, which *is* adopted, and that which is *not* adopted by our English Courts of law, is well known and established; viz., that so much of the law as affects the rights and merits of the contract, all that relates *ad litis decisionem* (*b*), is adopted from the foreign country; so much of the law as affects the remedy only, all that relates *ad litis ordinationem*, is taken from the *lex fori* of that country where the action is brought." The principles here acknowledged are also clearly laid down in *British Linen Company v. Drummond* (*c*), *De la Vega v. Vianna* (*d*), and *Don v. Lippman* (*e*), overruling an older decision in which a contrary view appears to have been taken (*f*). It may therefore be regarded as beyond dispute that whatever relates to the enforcement of the remedy sought must be determined by the *lex fori*, the law of the country to the tribunals of which the appeal is made. But when a law, like the English Statute of Frauds, makes a particular species of evidence necessary to establish the constitution of the contract which was not foreseen or required by the law of the place of celebration, or rejects evidence which that law would have admitted, it becomes more difficult to determine whether this question belongs peculiarly to the enforcement of the remedy, or to the materiality of the contract. A similar difficulty arises, where the English law, as the *lex fori*, instead of being more stringent than the law of the *locus contractus*, is less so, and admits evidence which would have been rejected in the *forum celebrationis* or *solutionis*, as the case may be. It has been decided, as will be shewn

(*a*) 2 Scott, 326.

(*b*) *Vid. Bartolus, Comm. Cod. I. i. 1.*

(*c*) 10 B. & C. 903.

(*d*) 1 B. & Ad. 284.

(*e*) 5 Cl. & F. 1.

(*f*) *Williams v. Jones*, 13 East, 439.

immediately, that both these questions belong to procedure, and are to be determined by the *lex fori* alone; and this is so even where the matters to which the questionable evidence relates are themselves mere formalities of celebration. The distinction, which it is rather difficult to discern at first sight, appears to be this. The *lex fori* does not attempt to dictate to those who contract beyond its jurisdiction what ceremonies or formalities shall be employed, nor does it examine a contract that is properly evidenced before it, to see whether the forms and ceremonies actually used are such as it is accustomed to. But it has its own rules of evidence as to the manner in which a contract must be proved as a fact, whether, for example, by parol testimony or by writing, and to these it adheres, whatever may have been the requirements of the foreign law. The question of stamped documents is governed by the same considerations. Facts, such as the payment of money to another's use, will be accepted as *proved* by the *lex fori* without the evidence of a foreign stamp (*a*) ; but if the law of the place where a contract is made declare that it shall be void unless a stamp is used, it cannot be sued upon or enforced elsewhere. These principles are illustrated by the following cases.

1. First, the *lex fori* prevails, when its rules as to evidence are more stringent than those of the *lex loci celebrazioneis* or *solutionis*—that is, where it demands evidence which they do not require, or rejects evidence which they admit. Thus, in *Leroux v. Brown* (*b*), it was held that s. 4 of the Statute of Frauds, providing that no action shall be brought upon certain contracts that are not evidenced by writing, applied to contracts made abroad. In that case Jervis, C.J., said, "It is not denied that if s. 4 of the Statute of Frauds applies to the contract itself or to the solemnities of the contract, it cannot be enforced here. I am of opinion that the section in question *applies not to the solemnities of the contract, but to the procedure,*

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to evidence.

(*a*) *Bristol v. Sequeville*, 5 Ex. 275, 279.

(*b*) 12 C. B. 801.

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and therefore that the contract cannot be sued upon here." *Acebal v. Levy* (a) shews that the Statute of Frauds similarly claims to regulate procedure, when in competition, not with the law of the place of celebration, but with the law of the place of performance. That was an action for the non-receipt of goods ordered by the defendant in London from the plaintiff in Spain, the letter conveying the order being an imperfect memorandum within the Statute of Frauds. Mr. Westlake cites this case for the proposition that when there were several parties to a contract, the solemnities which must be satisfied by each are those of the place where he engages himself, and says that the Statute of Frauds applied because the defendants wrote their letter ordering the goods in England. But according to the passage just cited from the judgment in *Leroux v. Brown* (b), the Statute of Frauds does not apply to solemnities at all. If it did, it is there expressly stated that it would not regulate contracts merely in the right of the *lex fori*, but the very ground of that decision was that it applied not to solemnities, but to procedure. The real conflict in *Acebal v. Levy* appears to have been between the English law, claiming to regulate procedure as the *lex fori*, and the Spanish law as the *lex loci solutionis*. The contract proved (apart from the question of the Statute of Frauds) was a contract that the plaintiff should load a particular vessel then lying at a Spanish port with nuts at the shipping price of that port. This being done, there was a delivery to the defendant on board their ship in Spain, and though the Court did not consider that there was an acceptance to bind the defendant and take the case out of the Statute of Frauds, yet it is difficult to see how any law but the Spanish can be regarded as the law of the place of performance. The Statute of Frauds was therefore held to apply, not because the defendant promised in England—according to *Leroux v. Brown* it would have been the same wherever he promised—but

(a) 10 Bing. 376.

(b) 12 C. B. 801.

because its provisions are intended to regulate procedure, and the law of the place of performance of a contract cannot, in an English Court, be allowed to compete with it.

2. When the *lex fori* admits evidence which the *lex loci celebrationis* would have rejected, the facts will be taken as sufficiently proved, but if they disclose that the solemnities required by the *lex loci celebrationis* were not fulfilled, then in accordance with that law the contract will be held void. Thus, it is now established that a written contract which does not bear the stamp required by the law of the place where it was made cannot be sued upon in England (*a*), though the opposite view had formerly been taken (*b*), on the ground that the revenue laws of a foreign State need not be regarded. But in *Bristow v. Sequeville* a receipt proving the payment of money to the use of another was admitted in evidence, though without the stamp required by the law of the *locus actus*; and although Mr. Westlake expresses his dissent from this decision (*c*), it is submitted, with all respect to his authority, that it is in perfect accordance with the principles of *Alves v. Hodgson* and *Clegg v. Levy*. The *lex loci actus* no doubt said that such a receipt, unstamped, should not be admitted to prove the payment. That, in the opinion of Lord Cranworth, was a pure question of procedure, and so far it is difficult to see how a contrary opinion could be maintained. The payment to the use of another being thus proved as a fact, where was the contract? The contract was one implied by law, begotten by the law out of that fact. It was a contract which would be implied as well by the foreign law as by the English, if the facts which rendered the implication necessary were sufficiently

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(*a*) *Alves v. Hodgson*, 7 T. R. 241; *Clegg v. Levy*, 3 Camp. 166; *Bristow v. Sequeville*, 5 Ex. 275, per Lord Campbell. The point seems to have arisen in *Legrelle v. Davis*, 5 L. T. 54, where a rule *nisi* was obtained on the ground that the stamp of the *loci celebrationis* was necessary, but the case is not further reported.

(*b*) *James v. Catherwood*, 3 Dowl. & Ry. 190; *Wynne v. Jackson*, 2 Russ. 351.

(*c*) Priv. Int. Law, § 177.

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brought before it. The rules of procedure of the foreign law prevented it from accepting the facts, but the rules of procedure of the English law did nothing of the kind ; and therefore the English law was able to make the implication which the foreign law did not.

[The less hesitation has been felt in dissenting from Mr. Westlake's view of *Bristow v. Sequeville*, because it is avowedly opposed to that adopted by Lord Cranworth in coming to his decision ; but in venturing to criticise an authority of so much weight, it is right to give the reasoning by which it is supported. Mr. Westlake says (§ 177), "The special force of a rule of evidence is to exclude, not to admit, testimony of a certain character, every kind being *prima facie* receivable. We therefore give full effect to the *lex fori* if we admit no evidence which it rejects ; without accepting, merely because it does not reject it, proofs of which the real tendency is not to establish but to create an obligation. Or the point may be put thus. Read the evidence, if you please, but read it for what it is worth. The point we have to try is whether there was an obligation in the *locus contractus*, to the law of which you submitted yourself ; and to this your evidence does not go, for it only proves the transaction as a fact, which is not enough." In answer to the first argument, it may be said briefly, that, if the special force of a rule of evidence is "to exclude, not to admit, testimony of a certain class, every kind being *prima facie* receivable," then, if we are to follow the *lex fori*, we must exclude the evidence which it excludes, and admit all other. To exclude anything more would be to follow, not the *lex fori*, but the *lex fori plus* the law of some other country. Nor is it accurate to say that proofs can create an obligation ; the most they can do is to shew whether an obligation has been created. Secondly, if the transaction is proved as a fact, that is enough ; for the contract in *Bristow v. Sequeville* was one which was implied out of the fact by the law. It must be assumed (the contrary not being shewn), and it no doubt was the case, that the *lex loci actus* would

equally have implied the obligation, if it had recognised the fact. The *lex fori*, therefore, when it had once got the fact established, was able to say that there was an obligation even by the *lex loci actus*; although the *lex loci actus* would have been obliged to ignore the obligation which it had itself created, because it could not take judicial notice of the fact out of which that obligation arose.]

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The doctrine that the formalities of a contract depend in all cases upon the law of the place of celebration, and that the validity of the obligation will be recognised by no Court, if these preliminaries have not been complied with, is not at all impeached by the judgment in the case of *Ex parte Melbourn* (a). There the law of Batavia, where the contract was executed, required that any contract made on marriage, by which property was settled on the wife separately, should be registered, *in order to have any effect as against third parties*. It was held in substance that this was not a formality preliminary to the validity of the contract, but a provision as to the future remedies of the creditors of the husband, in the event of his assets being administered in bankruptcy. It will be seen elsewhere that in bankruptcy all priorities between creditors are regarded as matters of procedure, which the *lex fori* alone is entitled to decide (b). But where the law of the matrimonial domicil, which had been expressly adopted by the parties to regulate their rights in each other's goods, required that in any postnuptial contract entered into by the wife respecting her movable property, there should be as many original instruments as there were distinct parties, a contract executed by her in England was held valid, though these formalities had not been complied with (c). No law can prevent competent parties from contracting validly according to the *lex loci*; though persons may, of course, contract themselves out of such a power in reference to a particular subject-matter.

Formalities
distinguished
from pro-
cedure.

(a) L. R. 6 Ch. 64.

(b) *Pardo v. Bingham*, L. R. 6 Eq. 485.

(c) *Guepratte v. Young*, 4 De G. & Sm. 217.

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Transfer of
immovables—
contracts for.

The one exception in English law to the maxim *locus regit actum*, as applied to the formalities of contracts, is the result of the principle which claims supremacy for the *lex situs* in all that relates to immovables. That principle was laid down clearly by Lord Mansfield in *Robinson v. Bland* (a) in 1760, and even older authorities to the same effect are found with respect to wills (b). "In every disposition or contract," says Lord Mansfield in the case cited, "where the subject-matter relates locally to England, the law of England must govern, and must have been intended to govern. Thus, a conveyance or will of land, a mortgage, a contract concerning stocks, must all be sued on in England, and the *local nature of the thing requires them to be carried into execution according to the law here.*" A similar doctrine was adopted in *Waterhouse v. Stanfield* (c). In that case the effect of the Demerara law was considered as to land in Demerara, and it was held that a local statute, purporting to restrain the alienation by a debtor of any immovable property without the assent of his debtors, express or implied, and without certain prescribed forms intended to secure this object, must prevail to exclude the claim of an English assignee of the equitable interest in such land.

The deviation from the rule of *locus regit actum* with regard to immovables, which has just been stated, is explained by Westlake (d) as the necessary result of the peculiar character of the English land law. It is not acknowledged by continental jurists, though as firmly established in Scotch and American law (e) as in our own, and it may be perhaps more correctly regarded as one of the essential differences between the real property law of England and that of foreign countries, than as a consequence of those differences. There is an obvious difficulty in selecting one of concurrent phenomena as the result of the others, and it is a safer theory to assume for all a

(a) 2 Burr. 1079.

(b) *Bovey v. Smith*, 1 Vern. 85 (1682); *Coppin v. Coppin*, 2 P. Wms. 293 (1725); Westlake, Priv. Int. Law, § 84.

(c) 10 Hare, 254.

(d) Priv. Int. Law, § 83.

(e) Story, Conflict of Laws, 727.

common parentage. It is quite true, as Westlake says, that the English law "cannot possibly recognise a transfer of land, which, made in a foreign form, might contemplate estates, rules of succession, and other incidents of property, so strange to its system that even the words in which they were expressed might be incapable of an English interpretation." But it cannot be assumed that it was for that reason, a reason of convenience only, that the English law has always rejected foreign transfers of English land. The real cause was more probably the spirit of exclusion which has applied the *lex situs* in England to every conceivable question that affected the soil—to the question of succession, for example, and of the legitimacy of the heir (a). "*Nullus princeps legitimat personam ad succedendum in bona alterius territorii,*" are the words of D'Argentré (b), quoted by Westlake; and it can scarcely be doubted that the exclusiveness of the feudal law in this particular was due to higher considerations than the difficulty of translating a foreign conveyance, or of interpreting the meaning of a foreign legal practitioner.

The cases in which an *English* stamp is required, on English documents executed out of the United Kingdom, are now ^{stamp laws.} indicated by 33 & 34 Vict. c. 97, s. 17, which enacts that no instrument executed in any part of the United Kingdom, nor relating, *wheresoever executed*, to any property situate or to any matter or thing done or to be done in any part of the United Kingdom, be pleaded or given in evidence (except in criminal proceedings) or be admitted as good or available in law or equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed. And by s. 15 of the same Act, provision is made for stamping without penalty instruments made abroad, within two months from their being brought into the United Kingdom. Thus a contract made abroad requires an English stamp, if the subject-matter or

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(a) *Birtwhistle v. Vardill*, 5 B. & C. 438; 2 Cl. & F. 571.

(b) Art. 218, 6, n. 20.

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place of performance be in England. If the law of the place of celebration declared that all contracts made within its jurisdiction should be void without the local stamp, such contracts as those referred to in 33 & 34 Vict. c. 97, s. 17, would apparently require a *double* stamp, the foreign as well as the English, according to the principles already explained as deducible from *Alves v. Hodgeson* (*a*), *Clegg v. Levy* (*b*), and *Bristow v. Sequeville* (*c*).

It is to be noticed that an older statutory provision (1 & 2 Geo. IV. c. 55, s. 1) on this subject, now repealed by 33 & 34 Vict. c. 97, contained explicit language preventing this result, by an enactment that “every deed, agreement, or other instrument relating to any real or personal property in Great Britain or elsewhere than in Ireland, or to any matter or thing (other than the payment of money) to be done in Great Britain or elsewhere than in Ireland, shall be chargeable with such stamp duties as are or shall be payable by the laws for improving and regulating the stamp duties in Great Britain, and *not with any other stamp duty*: *Provided always that every such deed, agreement, or other instrument shall be charged and chargeable with such stamp duties accordingly, and no more, whether the same shall be engrossed and executed at any place or places within the United Kingdom, or at any place or places not within the United Kingdom, and whether any of the parties to such deed, agreement, or other instrument shall be resident in or executing the same at any place either in Great Britain or Ireland or elsewhere.*”

This language was no doubt clear enough, although its effect may have been doubtful, but the whole Act was repealed in 1870 (33 & 34 Vict. c. 97), and the new enactment contained in 33 & 34 Vict. c. 97, s. 17, which has already been cited, contains no equivalent provision. Sect. 3 of the last-mentioned statute does, it is true, enact that there shall be charged upon the several instruments specified in the schedule to the Act, “*the several duties in*

(a) 7 T. R. 241.

(c) 5 Ex. 275.

(b) 3 Camp. 166.

the said schedule specified, and no other duties." The effect of this general provision may, however, well be doubted. It is clearly not a law intended to render the imposition of duty by the *lex loci celebrationis*, in the cases covered by s. 17, illegal ; and it is more than arguable that it amounts to no more than an enactment that no other duties are to be imposed by *English law* (a). Are they not, however, to be recognised by an English Court, when duly imposed by a foreign law, competent according to the rules of international jurisprudence to impose them ? It is submitted that they are, and that if a contract were made abroad in a country the law of which declared that all contracts should be void if made within its limits without the local stamp, it could not, though requiring an English stamp under s. 17 of the Stamp Act, 1870, be sued upon in an English Court without the foreign stamp as well, notwithstanding the provisions of s. 3.

It should be remarked that, apart from these statutory provisions, no duty was chargeable, according to the earlier Stamp Acts, on agreements not made within Great Britain. Sect. 2 of the Stamp Act, 1815 (55 Geo. III. c. 184), enacts that the duties specified in the Act shall be raised, levied, and paid unto and for the use of the Crown, *in and throughout the whole of Great Britain*, for and in respect of the instruments, matters, and things mentioned in the schedule. Accordingly it was held by Lord Kenyon at Nisi Prius, that for an agreement made on board a ship at sea, a stamp was not required (b). The stamp was always, however, essential if the agreement was actually made in England, whatever might have been the place of performance, or the *situs* of the subject-matter (c). These decisions were upon the earlier Stamp Acts, but the language of 33 & 34 Vict. c. 97, s. 17, cited above, is even less ambiguous. "No instrument executed

(a) It is to be noted that according to the preamble, the object of 1 & 2 Geo. IV. c. 55, was to remove doubts in cases where the stamp laws of England and Ireland came into competition.

(b) *Ximenes v. Jaques*, 1 Esp. 311.

(c) *Wright v. Commissioners of Inland Revenue*, 11 Ex. 458; *Stonelake v. Babb*, 5 Burr. 2675.

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Bills of
Exchange.

in any part of the United Kingdom . . . shall except in criminal proceedings be pleaded or given in evidence, or admitted to be good, useful, or available in law or equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed."

Until the passing of the Stamp Act, 1870, the stamps on foreign bills of exchange were regulated by 17 & 18 Vict. c. 83, which provided (s. 3) that a stamp should be necessary on all bills drawn out of the United Kingdom, whenever they should be paid, indorsed, transferred, or otherwise negotiated within the United Kingdom. No stamp was required on bills drawn abroad and payable in this country until this enactment; but the stamp required is not of course made a *formality* of the original contract by such statutory provisions. It does, however, become a formality of the contract between the indorser and indorsee, if the bill is indorsed in England, and then is governed as such by the *lex loci*. If, therefore, the indorsee sued the indorser in a foreign Court on a foreign bill, the indorsement having taken place in England, and it appeared that the English stamp had not been affixed, the foreign Court should in strictness refuse to recognise the indorser's liability; though *secus*, it would appear, if the English statute merely said that the bill and indorsement should not be *given in evidence* without the English stamp (a). The Stamp Act, 1870, repealed the provisions of 17 & 18 Vict. c. 83 on this subject, but re-enacted them in another form. By sect. 51 it is provided that every person into whose hands any bill or note made out of the United Kingdom comes, shall, before he presents for payment, or indorses, transfers, or in any manner negotiates or pays such bill or note, affix thereto a proper adhesive stamp and cancel the same. Sect. 54 imposes a penalty of £10 on every person who issues, indorses, transfers, negotiates, presents for payment, or pays, any bill or note liable to duty and not stamped; and further enacts that

(a) *Bristow v. Sequerville*, 5 Ex. 275; *Alves v. Hodgson*, 7 T. R. 241, and *ante*, p. 279.

the person who takes or receives from any other person any such bill or note unstamped shall not be entitled to recover on the same, or to make the same available for any purpose whatever (*a*). These provisions appear to go far beyond any mere regulations of evidence and procedure, so that the principle of the judgment in *Bristow v. Sequerville* (*b*) would not apply to them, if under the circumstances just supposed an English indorsee were to sue the indorser in a foreign Court. The question as to what amounted to indorsement, negotiation, or transfer, under the earlier statute, arose in *Griffin v. Weatherley* (*c*). When, however, a foreign bill of exchange which has been transferred or negotiated in England is sued on in an English Court, if the stamp appear to be on it at the time of the trial, it will be presumed, in the absence of evidence to the contrary, to have been there when the bill was transferred to the holder (*d*).

(c.) *Legality of Contract.*—Wide as the operation necessarily is which is given to the *intention* of the parties to a contract, it is plain that it can have no effect upon the question of the legality or illegality of the thing contracted for. No law can permit itself to be evaded, nor can it, consistently with the principles of international jurisprudence, sanction the evasion of a foreign law. Thus, if the thing contracted to be done is illegal by the law of the place of the intended performance, the contract should be held void, wherever it was actually entered into, by all Courts alike. Where, however, it is the contract itself, the exchange of a certain consideration either for any or for a certain promise, that one of the competing laws claims to forbid, the question assumes a different form. In such a case it would seem that the legality of the agreement must be decided by the law of the place where it is made. It appears clear, at any rate, that a contract illegal by that law will not be recognised or

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- (*a*) 33 & 34 Vict. c. 97, ss. 51, 54.
- (*b*) 5 Ex. 275.
- (*c*) L. R. 3 Q. B. 753.
- (*d*) *Bradlaugh v. De Rin*, L. R. 3 C. P. 286.

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Performance
illegal by
*lex loci
celebrationis.*

adopted by the English Courts; though the converse case, where a contract was legal where made but is forbidden by English law, may often prove a more complex one. No tribunal can of course be called upon to sanction or enforce any agreement which is contrary to its own notions of justice or morality.

First, therefore, with regard to performance, where the thing contracted to be done is illegal by the law of the place where it is intended to do it, the contract is void in all Courts alike. This is only in accordance with the general principle that all questions relating to the mode, time, or conditions of performance are to be determined by the law of the place where the parties have agreed to perform (*a*); and subject to one exception to be presently noticed, the rule is firmly established, though the English authorities on the point are scanty. Thus an agreement, to be carried into effect in this country, which would be void on the ground of champerty if made here, is not the less void because made in a foreign country where such a contract would be legal, and with a domiciled subject of that foreign country (*b*). In *Branley v. South-Eastern Railway Company* (*c*), the distinction between a case of this kind, and one where the element of illegality does not touch the performance of the agreement, is clearly seen. The question was, whether the railway company, who were directed by English statutes to charge uniform rates for carriage, could impose an increased charge upon "packed parcels" received at Boulogne for conveyance to London; such an increased charge having been pronounced by the Courts illegal when the contract was made in England (*d*). What the company contracted to do in that case was to carry a packed parcel, part of the journey being in England; and as there was no illegality in carrying packed parcels in England, it appears to have

(*a*) *Branley v. South-Eastern Ry. Co.*, 12 C. B. N.S. at p. 71, *per* Tindal, C.J., in *Trimbey v. Vignier*, 4 M. & S. 695, 704, *infra*.

(*b*) *Grell v. Levy*, 16 C. B. N.S. 78. (*c*) 12 C. B. N. S. 63.

(*d*) *Parker v. Great Western Ry. Co.*, 7 M. & G. 253; 11 C. B. 545; *Crouch v. Great Northern Ry. Co.*, 11 Ex. 742.

been rightly decided that the contract made in Boulogne for an increased rate of payment on such articles could be recognised by English law. "As a general rule," said Erle, C.J., "the *lex loci contractus* governs in deciding whether there was illegality in the contract; and according to the law of France, there was nothing illegal" (a). This *dictum* must, according to the principle now under consideration, be qualified by regarding the "general rule" as applicable to the illegality of the contract itself, and not of its performance merely. It may indeed be supported in another sense, by remembering that when a question of performance arises, the *lex loci contractus* is the law, not *lex loci celebrationis* but *solutionis*. In *Heris v. Riera* (b), referred to by Westlake, an agreement had been made in Spain between a merchant and an officer of the Spanish government, which the fiduciary position of the latter rendered void by Spanish law. The plaintiff alleged a renewal and repetition of the contract out of the Spanish dominions, an allegation which was held to be unsupported by sufficient evidence; but Westlake suggests that even if such a promise had been sufficiently proved, it would have been void by the law of Spain as the country of performance. In *Pattison v. Mille* (c) a contract of insurance was made in Scotland by the agent of an English insurance company for granting a marine policy in London, during the operation of the statute (6 Geo. I. c. 18), which conferred upon certain other companies a monopoly of marine policies of insurance. It was held that the agreement, notwithstanding, could be sued upon; partly upon the ground that the statute was not intended to apply to Scotland, or to a contract to insure Scotch property entered into in Scotland; partly upon the hypothesis that England was not necessarily the country of performance, and that a policy in accordance with the contract might even have been granted in Scotland. In *Robinson v. Bland* (d), Lord

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(a) 12 C. B. N.S. at p. 72.

(b) 11 Sim. 318; Westlake, § 193.

(c) 1 Dow & Cl. 342.

(d) 2 Burr. 1078. But now see *Quarrier v. Colston*, 1 Phill. 147.

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Mansfield went beyond the principle under discussion, and expressed an opinion that a bill given in France for a gaming debt, and payable in England, was subject to the English law as that of the place of performance, and that the holder could not recover. "The law of the place of contract," said Lord Mansfield, "can never be the rule, where the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed." It has been already pointed out that the question of illegality in the performance comes within the general rule enunciated by Story, that where the contract is either expressly or tacitly to be performed in another place, the contract, in conformity to the presumed intention of the parties, is to be governed, as to its validity, nature, obligations, and interpretations, by the law of the place of performance (*a*). And just as any connection with an illegal object is held sufficient in municipal law to vitiate a contract (*b*), so it is not necessary for the application of this principle to private international law, that the contract to which exception is taken should be expressly to do some action prohibited by the law of the place of intended performance. Thus the vendor of goods intended to be smuggled into England, who had lent himself to the unlawful intention by packing them in a particular way, was held unable to recover their price (*c*) ; though under somewhat similar circumstances, a vendor who had a knowledge only of the illegal design, to the furtherance of which he had not himself contributed, was not debarred from suing (*d*). The decisions in the two last-mentioned cases have been much criticized, and exception can no doubt be taken to the reasoning of Lord Abinger in the latter of the two. "The distinction is, when he takes an actual part in the illegal adventure, as in packing the goods in prohibited parcels or otherwise,

(*a*) Story, § 280 ; 2 Kent, Comm. Lect. 393.

(*b*) See note to *Collins v. Bluntern*, 1 Sm. L. C. 369, and *per Tindal, C.J.*, in *De Begnis v. Armistead*, 10 Bing. 110.

(*c*) *Waymell v. Read*, 5 T. R. 599 ; 1 Esp. 91 ; *Lightfoot v. Tennant*, 1 B. & P. 551 ; *Biggs v. Lawrence*, 3 T. R. 454.

(*d*) *Holman v. Johnson*, Cowp. 341 ; *Pellecat v. Angell*, 2 C. M. & R. 311.

there he must take the consequences of his act. But it has never been said that merely selling to a party who means to violate the laws of his own country is a bad contract. . . . The plaintiff sold the goods; the defendant might smuggle them if he liked, or he might change his mind next day; it does not at all import a contract, of which the smuggling was an essential part" (a). In contrast with this the language of Eyre, C.J., may well be placed. "Upon the principles of the common law, the consideration of every valid contract must be meritorious. The sale and delivery of goods, nay, the agreement to sell and deliver goods, is *prima facie* a meritorious consideration to support a contract for the price. But the man who sold arsenic to one who he knew intended to poison his wife with it, would not be allowed to maintain an action upon his contract. . . . Other cases where the means of transgressing a law are furnished with knowledge that they are intended to be used for that purpose will differ in shade more or less from this strong case; but the body of the colour is the same in all. No man ought to furnish another with the means of transgressing the law, knowing that he intends to make that use of them" (b). The tendency which was exhibited, in the cases referred to Revenue laws. above, to extenuate participation not indicated by overt acts in intended smuggling, is no doubt due to another theory, which has established itself with much firmness in English jurisprudence, that the obligations of revenue laws have less claim to respect than any other legal commands. The distinction between *malum prohibitum* and *malum in se* has nowhere taken a more powerful hold upon the legal imagination. Its effect in extenuating passive participation in the breach of our own revenue laws has been already indicated; but it has had a wider operation still with regard to those of foreign countries; and in more than one case it has been held that an act declared illegal by a foreign revenue law as the law of the intended place

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(a) 2 C. M. & R. 313.

(b) *Lightfoot v. Tennant*, 1 B. & P. 551, 555.

PART III. of performance is not illegal at all, but can be validly contracted for in England. Thus a contract made in England to defraud the revenue laws of Portugal was supported by Lord Hardwicke (*a*) ; and a contract to insure a ship intended to engage in trade with a Spanish colony forbidden by the mother country was recognised upon the same principle by Lord Mansfield (*b*). Modern writers have, however, concurred in condemning these decisions, and though the theory is firmly established in America also, it can hardly be assumed that they will be followed in the event of the question again arising here (*c*).

Illegality of agreement.

Secondly, the question of legality may arise with reference to the contracting of the agreement, and not to its performance. The consideration, on one side or the other, may either be an unlawful thing in itself to exchange for any promise, or unlawful with reference to the particular promise for which it is given. There is no authority for saying that the question of legality, in such cases as these, is determined by any other law than that of the place where the contract is entered into, except the *dictum* in *Robinson v. Bland* (*d*), which has been already mentioned. In *Quarrier v. Colston* (*e*) the plaintiff was held entitled to sue in England for money lost and lent at gaming on the Continent, where there was no law prohibiting such practices; and though in that case there was no *lex loci solutionis* to compete with the *lex loci celebrationis*, the decision is valuable as shewing that Lord Mansfield's expression of opinion in *Robinson v. Bland* is practically overruled. Had the gaming transactions taken place in England, the whole consideration for the debt would have been illegal in itself, and one which could not have been lawfully exchanged for any promise. In *Branley v. South-*

(*a*) *Boucher v. Lawson*, cas. temp. Hard. 85, 191.

(*b*) *Lever v. Fletcher*, Park. Mar. Ins. i. 506. See also *Sharp v. Taylor*, 2 Phill. 801; *Simeon v. Bazett*, 2 M. & S. 94; *Bazett v. Meyer*, 5 Taunt. 824.

(*c*) See *Story*, § 257; *Westlake*, § 201, 202; 1 *Chitty, Comm.* 83, 84; 3 *Kent, Comin.* 266, 267.

(*d*) 2 *Burr.* 1078.

(*e*) 1 *Phill.* 147. See 9 Anne, c. 14, s. 1, and 18 Geo. II. c. 34, s. 3.

Eastern Railway Company (a), which has just been referred to, it was conceded that the English statute prohibited the railway company, in England, from contracting to carry "packed parcels" at an increased rate, or from departing under any circumstances from a uniform rate. This promise to carry was therefore an unlawful consideration to exchange, according to English law, for any promise but one, i.e., a promise to pay for the carriage according to the uniform statutory rate. But the performance of the promise, the carriage of the goods, was in no sense prohibited by the law of the place of performance, and the *lex loci celebrationis* was therefore allowed to determine for itself the legality of the interchange of promises; just as in *Quarrier v. Colston* (b) the same law was left to pronounce upon the legality of a gaming transaction. If the giving of the consideration for the promise was unlawful in the first instance by the law of the place where the transaction took place, a renewal of the promise in another country where the contract could lawfully have been made, as by giving new bills in France for a gaming debt previously contracted in England, will not, without fresh consideration, whitewash the original illegality (c).

It might perhaps have been doubted how far these contracts resulting from gaming might have properly come under the head of those agreements, already referred to, which the law refuses to recognise, wherever they are made and in whatever place they are to be performed, because of their moral turpitude or their injurious effect upon the interests of the State or of society. It can hardly be said that such cases properly come under the domain of international law at all, inasmuch as the international element in them, if any, is obliterated by the brand of illegality which the law of England, as the *lex fori*, stamps upon them as soon as their real nature is made apparent. Amongst this class may be enumerated all

(a) 12 C. B. N.S. 63, *ante*, p. 288.

(b) 1 Phill. 147.

(c) *Wynne v. Callander*, 1 Russ. 293.

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contracts the object of which involves a breach of the national neutrality in time of war, or is calculated to lend assistance to insurgents against a friendly State (*a*) ; all contracts for future immorality or illicit connection of the sexes, or based in any other way upon moral turpitude and opposed to the interests of justice (*b*). Contrary to what might, perhaps, have been expected, a contract for the sale of slaves does not appear to be regarded by the English law as so tainted with turpitude as to be incapable of recognition. That this should have been the view taken when slaves were still held in the British colonies, and regarded there as part of the soil—*ascripti glebae*—is not, of course, a matter for surprise (*c*) ; nor that, before the conclusion of a treaty between Great Britain and Spain for the suppression of the slave trade, and the creation of a right of searching Spanish vessels on the high seas with that object (*d*), it should have been held that a Spaniard, being not prohibited from carrying on the slave trade by the laws of his own country, might recover damages in an English Court in respect of the wrongful seizure by a British subject on the high seas of a cargo of slaves on board his ship (*e*). The slave trade is not, and has never been, piracy by the law of nations (*f*), except by convention, and the action therefore was no doubt maintainable. But so recently as 1860 it was held by the Exchequer Chamber that a contract might be made by a British subject for the sale of slaves, lawfully held by him in a foreign country where the possession and sale of slaves is lawful (*g*). The defendants in that case were the directors of an association or partnership, consisting of themselves and

(*a*) *De Wütz v. Hendricks*, 9 Moo. 586; S.C. 2 Bing. 314; *Thompson v. Powles*, 2 Sim. 194; *Jones v. Garcia del Rio*, 1 T. & Russ. 297; *Yrisarri v. Clement*, 2 C. & P. N. P. C. 223; 3 Bing. 432; *Hennings v. Rothschild*, 9 B. & C. 470; 4 Bing. 315, 335; *Taylor v. Barclay*, 2 Sim. 213.

(*b*) Com. Dig. Assumpait, F. 7; *Collins v. Blantern*, 1 Sm. L. C. and note; *Madrazo v. Willes*, 3 B. & Ald. 353; *Forbes v. Cochrane*, 2 B. & C. 448.

(*c*) *Smith v. Brown*, 2 Salk. 666.

(*d*) *Wheaton, Int. Law (Lawrence)*, p. 259.

(*e*) *Madrazo v. Willes*, 3 B. & Ald. 353.

(*f*) *Wheaton, Int. Law*, p. 256.

(*g*) *Santos v. Illidge*, 6 C. B. N.S. 841; 8 C. B. N.S. 861.

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others, all British domiciled subjects, and were the owners of certain slaves in the Empire of Brazil, where slavery was lawful. The action was brought for breach of a contract of sale, and the question turned mainly upon the proper construction of the English statutes forbidding the purchase, sale, or barter of slaves (5 Geo. IV. c. 113; 6 & 7 Vict. c. 98), the slaves in question having been purchased by the defendants themselves in Brazil after the passing of the former, but before the commencement of the last-mentioned Act. In the Court of Common Pleas it was held that the effect of the two statutes, read together, was to prohibit the trade in slaves by all persons within the control of the legislature, including British subjects all over the world; and it was added, that the fact of the plaintiff being a foreigner did not authorize him to sue in the Courts of this country for the breach of a contract entered into by an English subject in violation of English laws (a). This judgment was, however, reversed on appeal in the Exchequer Chamber by four judges to two, on the ground that there was nothing in the English statutes to prohibit a contract by a British subject for the sale of slaves, lawfully held by him in a country where the possession and sale of slaves is lawful. It will be seen that this decision, as did that of the judges in the Court below, proceeded entirely upon the intention of the English legislature, as gathered from the proper interpretation of the English statutes; nor was it pretended that a contract for the sale of slaves could be impeached on any other ground. The history of English legislation on this subject gives the real key to the reasons for regarding the subject in a manner so opposed to that which is now supposed to be the spirit of English law. If English law had been always that which it is now, such a contract would no doubt be regarded in itself as something iniquitous, and incapable, just as a contract for prostitution, of enforcement in an English Court. But inasmuch as the rights of slave-holders were at one time an integral part of our

(a) 6 C. B. N.S. 841, 862; *Esposito v. Bowden*, 7 E. & B. 763.

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territorial
operation
of law.

own law, just as they are still of the law of some other countries, it is plain that only the limitations which have been placed by English statutes on those rights can be recognised by English law, and that a contract which was once legal must still be regarded as valid, except so far as its legality has been taken away by positive enactment. It cannot be asserted that such a contract is so iniquitous that it ought not to be recognised in an English Court, no statute having declared it to be so; and therefore, although such contracts may be *forbidden* by English law, its legality must be tested, not by the *lex fori*, but by the law of the place where the contract was made or where it was to be entered into (a). "In this case," said Bramwell, B., in *Santos v. Illidge*, "the plaintiff sues on a contract made with him, a Brazilian, in the Brazils, which the defendants can lawfully perform there. The defendants refuse to perform it, and give as a reason one which would not be good there, nor probably in any other country than this, viz., that the performance of their contract there would be an offence against the laws here, and therefore ought not to be enforced here" (b). The decision of the Exchequer Chamber was in effect that the reason was not in fact good even in England, though it no doubt would have been, had the English law said expressly that it should be. "The general run of laws enacted by the superior State are supposed to be calculated for its own internal government, and do not extend to its distant dependent countries; which bearing no part in the legislature, are not therefore in its ordinary and daily contemplation" (c). If true of distant dependencies, it is *à fortiori* so with regard to foreign independent States, that a government, when legislating with regard to acts, does not intend to include acts to be performed within any territorial limits but its own.

(a) *Ante*, p. 292.

(b) *Santos v. Illidge*, 8 C. B. N.S. 867.

(c) 1 Bl. Comm. 101; *Attorney-General v. Stewart*, 2 Meriv. 143.

FORMALITIES OF CONTRACT.

The forms and ceremonies which the law of the place of celebration requires for the constitution of a contract, p. 275. are necessary and sufficient for that purpose.

But where the *lex fori* demands that a contract shall be p. 277. evidenced in a particular manner, these rules of evidence must be complied with, though their indirect effect is to impose a formality of celebration not required by the *lex loci celebrationis* or *solutionis*, or to refuse as insufficient formalities by which the *lex loci* was satisfied.

Conversely, the *lex fori* may admit evidence which the p. 279. *lex loci* would have rejected; but the contract, though proved as a fact, will in such cases be held void if that evidence shews that the formalities prescribed by the *lex loci* for the validity of the contract, as distinguished from the manner of proving it, were not fulfilled.

The general rule, that formalities are governed by the p. 282. *lex loci (locus regit actum)* does not, however, apply to contracts which concern immovable property, as to which the *lex situs* prevails.

The stamps which the *lex fori* requires on documents p. 283. executed out of its jurisdiction are rightly prescribed by it, as coming under the head of evidence.

Where the *lex fori* is silent, the stamp requirements of the *lex loci actus* must be complied with.

Legality of the Contract.

The legality of a contract depends generally upon the p. 287. law of the place of intended performance.

An act which is illegal by the law of the place where it p. 288. is intended to be done cannot be validly contracted for in any place.

But the legality of the making of the agreement, i.e., p. 292.

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Intention
of parties
controls
essentials.

the giving a particular consideration for a particular promise—seems to depend upon the *lex loci actus*.

(d.) *Essentials of Contract.*—It has been said above (a) that, assuming a contract to be legal, the intention of the parties is material to every question that can arise upon it, except that of their capacity to enter into a legal obligation at all. And the question of the formalities necessary to a contract, which has recently been considered, is not at all an exception to that rule, inasmuch as the parties contracting are presumed to have submitted themselves for certain purposes to the law of the place where the contract is entered into, and to have intended that the formalities required by that law should be fulfilled. It is obvious that every man who contracts at all, if he is a member of a civilized community, must be aware that his contract will be governed, so far as its formalities are concerned, by some system of law or another; and the system of law which will be oftenest in his mind as that which must claim respect, will undoubtedly be the system of law by which all other matters are regulated in the place where he undertakes his legal obligation. To undertake such an obligation something must be done or said there and then, and it is fair to assume that this something will be tested by the same law that regulates all other actions and words in the same locality. Such, accordingly, is presumed by private international law to have been the *intention* of the contracting parties; but when the essentials of the contract are the subject of consideration (to adopt the distinction between forms and essentials which is drawn in *Brook v. Brook* (b)), it is plain that the intention of the parties cannot be so simply ascertained. The legality, for example, of the act, or any of the acts, for which the contract stipulates, cannot depend in the mind of the parties, or in reason and fact, upon the law of the place where the promise to do it is given. Whether any act is a lawful one or not must depend entirely, if words

have any meaning, upon the law of the place where it is to be done. On this point it is hardly correct to say that the *intention* of the parties is at all material; the law does not, strictly speaking, presume them to have intended anything, except obedience to the proper law, whatever that might be; but it does presume them to have known that the legality of every act depends upon the law of the place of intended performance, as a maxim both of jurisprudence and of common sense. Again, the nature and extent of the obligation which the contracting parties take upon themselves must of course be defined and regulated, whether by construction or implication, by some law; and undoubtedly, so long as they propose to stipulate for nothing that is in any sense illegal, the intention of the parties, so far as it can be ascertained, is entitled to decide what law must be referred to for the purpose. If the contracting parties were told beforehand the exact law that was to regulate their contract, they could obviously contract for any lawful object they pleased, by the use of proper forms and proper language. It would then be in fulfilment of their intention to apply the law whose provisions had been in their minds to the contract when made. Now, whether parties to a contract are told or not, they will always assume some law or other as that which is to govern the obligation. The proper law, therefore, to be eventually applied by any tribunal for this purpose is that which will most frequently and most naturally be assumed by ignorant parties to a contract as that by which their liabilities are defined. The principle is well demonstrated by Lord Brougham, speaking of the rule which refers solemnities to the *lex loci*, in *Warrender v. Warrender* (a): "This is sometimes expressed, and I take leave to say inaccurately expressed, by saying that there is a *comitas* shewn by the tribunals of one country towards the laws of the other country. Such a thing as *comitas* or courtesy may be said to exist in certain cases, as where the French Courts inquire how our law would

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deal with a Frenchman in similar or parallel circumstances, and upon proof of it, so deal with an Englishman in those circumstances. This is truly a *comitas*, and can be explained on no other ground ; and I must be permitted to say, with all respect for the usage, it is not easily reconcileable to any sound reason. But when the Courts of one country consider the laws of another in which any contract has been made, or is alleged to have been made, in construing its meaning, or ascertaining its existence, they can hardly be said to be acting from courtesy, *ex comitate*; for it is of the essence of the subject-matter to ascertain the meaning of the parties, and that they did solemnly bind themselves ; and it is clear that you must presume them to have intended what the law of the country sanctions or supposes, and equally clear that their adopting the forms and solemnities, which that law prescribes, shews their intention to bind themselves; nay more, it is the only safe criterion of their having entertained such an intention. Therefore, the Courts of the country where the question arises resort to the law of the country where the contract was made, not *ex comitate*, but *ex debito justitiae*; and in order to explicate their own jurisdiction by discovering that which they are in quest of, and which alone they are in quest of, the meaning and intent of the parties."

In deciding, therefore, upon the proper law to be applied to the essentials of a contract, we must be guided by the intention of the contracting parties ; and it will be convenient first to understand clearly what the essentials are, having treated in the preceding pages of the legality of those acts which are forbidden by one and allowed by another of the competing laws. Under the term *essentials* may be classed generally every thing that does not come under the description of *forms*. And taking them in their natural order, these will be :—

(1) The construction and interpretation of the actual words, parol or written, by which the obligation is constituted.

(2) The nature and effect of the obligation which results

from those words, properly construed and understood, or which is implied by the law from proved or admitted facts, without the use of any language at all.

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(3) The performance of the contract.

(4) The defeasance or discharge of the contract otherwise than by performance.

(1) *Construction and Interpretation of Contracts.*—The construction and interpretation of contracts, being nothing more than the exact definition of what the parties meant by their words (and, in the case of implied contracts, it might perhaps be said, by their silence), appears to depend more absolutely upon the intention of the parties than any other branch of the subject. Now in those cases where the contract has been executed in a foreign country where the parties to it are domiciled, there can obviously be little or no doubt. The *lex domicilii* is also that of the *loci celebrationis*, and it can hardly be supposed that the parties intended that their language should be interpreted by any other law (a). Inasmuch as intention is a question of fact, it is no doubt conceivable that language might be used in such a contract which could be reasonably explained only by the law of the place of performance, but it is difficult to see how such a question of interpretation could arise apart from that of *performance*, which will require separate consideration. Subject to this reservation, it may be fairly assumed that when a contract is made abroad in the country of the domicil of the parties to it, an English Court will interpret its language by that law (b). But when the place of execution and the domicil of the parties are different, a further and more difficult question arises, nor is it always easy to see which of the competing laws should give way. On this point the language of Story, indeed, is distinct enough, if the decisions cited by him in support of it warranted its acceptation without reserve.

Construction
of contract
governed by
intention.

“The general rule, then, is, that in the interpretation of

(a) *Anstruther v. Adair*, 2 My. & K. 513, 516; *Thurburn v. Steward* L. R. 3 P. C. 504.

(b) *De la Vega v. Vianna*, 1 B. & Ad. 284; *Cood v. Cood*, 33 Beav. 314.

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contracts, the law and custom of the place of contract are to govern in all cases where the language is not directly expressive of the actual intention of the parties, but is to be tacitly inferred from the nature and objects and occasion of the contract. The rule has been fully recognised in the Courts of common law; and it has been directly decided by those Courts that the interpretation of the contract must be governed by the laws of the country where the contract is made. And the rule is founded in wisdom, sound policy, and general convenience" (a). The English cases cited in support of this proposition are *Trimbey v. Vignier* (b), *De la Vega v. Vianna* (c), and the *British Linen Company v. Drummond* (d), but none of them lay down distinctly that, in cases where the domicil of the parties and the place where the contract was made differ, an English Court will interpret the language of the contract by the law of the latter place in preference to all others. In *Trimbey v. Vignier* it is no doubt said by Tindal, C.J., that the interpretation of the contract must be governed by the laws of the country where the contract was made (*lex loci contractus*), while the mode of suing and the time within which the action must be brought must be governed by the law of the country where the action is brought (*in ordinandis judiciis, loci consuetudo, ubi agitur*). It is plain, however, first that the conflict of law here referred to was the conflict between the *lex loci contractus* and the *lex fori* on a question which it was contended was one of procedure; and secondly, inasmuch as the point there decided was that the effect of a blank indorsement in France of a note made in that country must be decided by the French law, it is evident that the question was not one of the interpretation of language at all, but of the nature and effect of the obligation which the language created—a matter which belongs properly to the next heading of the subject. In *De la Vega v. Vianna* the question was also one which was contended to belong to procedure as part

(a) Story, Conflict of Laws, § 272.

(b) 1 Bing. N. C. 151.

(c) 1 B. & Ad. 284.

(d) 10 B. & C. 903.

of the remedy, and was so held; and in addition to this, both the parties were obviously domiciled in the country where the contract was made. The point is put briefly by Lord Tenterden, C.J., who says, "The plaintiff and the defendant were both foreigners; the debt was contracted in Portugal, and it appears that by the law of that country, the defendant would not have been liable to arrest. . . . A person suing in this country must take the law as he finds it; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer" (a). It is quite clear that this decision has nothing to do with the principles on which the language of a foreign contract is to be interpreted, and it has been cited as an authority on that point only by reason of a *dictum* quoted in it of Heath, J., in *Melan v. Duke of Fitzjames* (b), to the effect that in *construing* contracts the Courts must be governed by the laws of the country where they are made. That too, however, was a case of procedure, in which the *lex fori* claimed to be heard; and the same observation may be made as to *British Linen Company v. Drummond*, the third case on which Story relies for his proposition, which turned on the applicability of the English Statute of Limitations to a contract made abroad.

The truth appears to be, that the expression "interpretation of contracts" is an ambiguous term, in the sense that it has been used with more than one meaning. Story apparently employs it, as it was in fact employed in one or two of the cases just cited, as comprising the general explanation and definition of the agreement which has been formulated between the parties, the rights arising out of it, and the effect of the relation which it has constituted. It will be obvious that the construction or interpretation of the language of the contract will be included in the phrase so used; and as the necessity of distin-

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(a) 1 B. & Ad. 287, 288.

(b) 1 B. & P. 138; and see *Talleyrand v. Boulanger*, 3 Ves. Jun. 447.

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guishing the part from the whole did not often arise, authorities on one point were accepted as equivalent to authorities on another. That Story did not mean to lay down as an absolute rule, that the law of the place where a contract was made must of necessity decide all questions which may arise on the construction of its language, is plain from what he goes on to add to the language quoted above. "Especially, in interpreting ambiguous contracts, ought the domicil of the parties, the place of execution, the various provisions and expressions of the instrument, or other circumstances implying a local reference, to be taken into consideration" (a).

It can hardly be supposed, therefore, that Story did intend on this question to advocate any imperative rule in favour of the place where the contract was actually executed; and the true principle is no doubt more accurately stated by Mr. Westlake (b). The Court must put a meaning upon the language used by the parties to a contract *in accordance with their intention*, and ambiguous words will be construed by it with reference to the law of one country or another, according as all the circumstances of the execution of the instrument, and all its terms considered as a whole, make that intention plain. Among the most important proofs pointing to that intention will be reckoned the place of the celebration of the contract, the domicil of the parties, and, in certain cases, the place of intended performance. The question was discussed in 1820 in the case of *Lansdown v. Lansdown* (c), which came before the House of Lords on appeal from the Irish Court of Chancery, the point being whether the words "lawful money of Great Britain" in a marriage settlement executed in England by parties domiciled there meant lawful money at the rate of English or Irish currency, the "lawful money" issuing as a rent-charge out of land in Ireland. It was held, on the whole instrument, that the intention of the parties was that the money

(a) Story, *Conflict of Laws*, § 27. (b) *Priv. Int. Law*, § 188.
(c) 2 Bligh, 60.

should be paid at the English rate of currency, notwithstanding the local situation of the land. "In the naked case of a charge upon lands," said Lord Eldon, "the law is clear and settled; but upon wills and instruments of marriage contract all the cases cited authorize a distinction. In such cases the intention of the person making the will (*a*), and of the parties to the contract, is to be collected from the different parts of the instrument. . . . In this case there are throughout the settlement charges on English as well as Irish estates. Can it be said, as to any of these charges, that a different sum is to be paid to the person entitled, according to the site of the estates out of which the money is drawn? In those instances, where Irish estates only are charged, the situation and conduct of the parties, and the language of the instrument of contract, shew that they meant English currency" (*b*). In *Kearney v. King* (*c*) it was held that a sum of money named in a promissory note meant a sum of money according to the currency of the place where the note was made; but Story points out (§ 272) that in this case the place where the contract was made is also presumed to be the place of intended performance by payment, so that there is a double indication of the intention of the parties. The same point was assumed in *Sprowle v. Legg* (*d*), on the authority of the last-mentioned case.

The question was mooted in the recent case of *Dent v. Smith* (*e*) under the following circumstances. The plaintiffs had effected an insurance with the defendants on certain specie on board a vessel owned and registered in England at the time of the execution of the policy, for the voyage from London to Constantinople. Before the ship sailed she was sold to a Russian company, and the requisite formalities to effect a change of her nationality accordingly were duly complied with. She sailed under

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(*a*) More recent decisions however have established the *lex domicilii* as the sole interpreter of a will. *Vid. ante*, p. 191.

(*b*) 2 Bl. 88, 93. *Vid. Phipps v. Anglesea*, 5 Vin. Ab. 29; 1 P. Wms. 696.

(*c*) 2 B. & Ald. 301.

(*d*) 1 B. & C. 16.

(*e*) L. R. 4 Q. B. 414.

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the Russian flag, and was stranded near Gallipoli before reaching her destination. The specie was saved, and was taken charge of by the nearest Russian consul until the rights of the owners of the ship and cargo should be adjusted according to Russian law, which prevailed within Turkish territory as to Russian subjects and Russian property by special treaty provisions with the Porte. The owners of the specie, in order to regain possession of it, were ultimately compelled to pay a much larger sum, under the name of salvage or general average, than would have been imposed upon them if the loss had been adjusted according to English law; and the question was whether this was a loss within the meaning of the words of the policy which the underwriters were compelled to make good. It was assumed in the course of the argument that English law, as the *lex loci celebrationis*, must govern the interpretation of the policy; and Cockburn, C.J., expressed his assent to the proposition that the English law must govern, though not expressly to the reason given (a). The decision was against the underwriters, apparently on the ground that whether the policy was construed by English law or not, the loss was one fairly covered by its provisions; but with respect to the question of the alleged right of the English law to prevail as the *lex loci celebrationis*, it should be observed that the vessel was English when the policy was effected, and that if her nationality had not been changed, the English law, instead of the Russian, would have regulated the rights of the parties in the event of the loss which happened; so that the opinion expressed by Cockburn, C.J., in favour of the English law as the law to govern the interpretation of the policy, may be referred as much to the undoubted intention of the parties as to the fact that the contract was made in England. In *King of Spain v. Machado* (b), a much older case, it appears to have been assumed that any instrument executed abroad was to be construed according to the law of the country where it was executed.

(a) L. R. 4 Q. B. 432, 445.

(b) 4 Russ. 225, 239.

It is undeniable, therefore, that although in theory the place of execution is only one of the proofs which are admitted to shew the intention of the parties, nevertheless, with regard to the interpretation and construction of their language, it is difficult to find any case in which the testimony furnished by it has not been held conclusive. In *Cood v. Cood* (*a*) the law of the domicil of the contracting parties was called in by Lord Romilly to construe the language used ; but in that case the English law, the law of the domicil, was also the law of the place where the letter containing the ambiguous language was despatched, nor were the reasons given for the preference of that particular law (which was also, of course, the *lex fori*) very clearly expressed. The subject-matter of the correspondence was the partition of the real and personal estate of a testator in Chili ; and though the question whether the letters amounted to a binding contract was decided in the manner just described, the decision was apparently arrived at after a general survey of the circumstances, including the fact that part of the property affected was land situate abroad.

There is a certain analogy, which is referred to by Story (*b*), between the relation of the local law to a contract celebrated abroad, and that of the local custom to an agricultural or commercial contract entered into in some particular part of England ; but it is only an analogy, and must not be pressed too far. Local custom in England may be regarded, within its territorial limits, as part of the common law by adoption, and the law, in following it, merely obeys itself ; but there is an obvious distinction between this principle, and that which requires English law to accept the interpretation and explication of a law wholly foreign to itself. The latter rule can only be defended, on the ground that it is the English law that every man's lawful contract shall be interpreted by reference to his intention, and on the further ground that a man who contracts abroad intends that the interpretation of the foreign

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law shall be invoked. The rule is not, therefore, an absolute one, and will be excluded by proof that the intention did not in fact exist ; while the rule that English contracts are to be construed with reference to every proved local custom is imperative, and the operation of the custom is only excluded by express stipulation to that effect, or by something in the contract wholly inconsistent with its admission (*a*). It should be observed, however, that customs affecting the land, as those relating to agricultural tenancy, are the only customs that can strictly be called local ; and even these are not incorporated with the contract as essential to its interpretation because the *contract is made* in a particular locality, but because the subject-matter of the contract is there situate. A lease of English land made abroad would certainly be construed with reference to the agricultural customs of the country where the land was situated. It therefore appears hardly justifiable to cite the English law as to the effect of agricultural customs upon contracts as an authority for the proposition that the true interpretation of a contract must be according to the usage of the country where it was made (*b*). And the custom which is imported into many commercial contracts, which have no relation to the soil, is not the custom of a particular locality as such, but the custom of a particular trade, market, profession, or association (*c*) ; in which case its operation is no doubt admitted wholly on the ground of the intention of the parties, but does not in any way shew that the law of the place where a contract is made has of its own nature any claim to express that intention. The correct view was clearly stated by Lord Kingsdown in a case before the Privy Council in 1859 (*d*). “ When evidence of the usage of a particular place is admitted, to add to or in any

(*a*) *Wigglesworth v. Dallison*, Dougl. 201; *Hulton v. Warren*, 1 M. & W. 474; *Myers v. Surl*, 3 E. & E. 306.

(*b*) *Story, Conflict of Laws*, § 270.

(*c*) *Hutchinson v. Tatham*, I. R. 8 C. P. 482; *Sutton v. Tatham*, 10 A. & E. 27; *Sweeting v. Pearce*, 30 L. J. C. P. 109; *Hunfrey v. Dale*, E. B. & E. 1004.

(*d*) *Kirchner v. Venus*, 12 Moo. P. C. 361, 399.

manner affect the construction of a written contract, it is admitted only on the ground that the parties who made the contract are both cognizant of the usage, and must be presumed to have made their agreement with reference to it. But no such presumption can arise when one of the parties is ignorant of it." The analogy, in fact, which exists between these cases, in which no conflict of law arises, and cases properly belonging to the domain of private international law, is useful only as establishing this general proposition, that all contracts are to be interpreted according to the intention of the contracting parties, and that any rules, whether of local or commercial custom or foreign law, will be admitted to aid in the interpretation, if it appears that they were in the mind and intention of the parties when the contract was made.

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(2.) *Nature and Incidents of the Obligation of a Contract.*—The words by which the contract was entered into having been rightly interpreted and construed by the Court, or the facts out of which it arose having been duly proved, and it being established that the formalities of celebration required by the *lex loci* were duly complied with, the next subject for inquiry is the nature of the obligation imposed. What is the law which is to measure and define the rights and liabilities of the parties to the contract? It has been already seen that with regard to the contract of marriage, Lord Campbell expressly (in *Brook v. Brook* (a)) assigned all the "essentials" of the contract to the *lex domicilii*, as the law of the place where the parties to the marriage contemplate performing the contract by residence. But it has been pointed out above (b) that there is an important distinction in this respect between the so-called contract of marriage and a contract in the strictly legal sense of the term. It is for the interest of every State, and therefore for the interest of States in general, that each should be left to determine for itself the exact nature of that which its domiciled subjects call marriage; and it is not in anything like the

Nature and
incidents of
obligation.

(a) 9 H. L. C. 193, 207.

(b) *Ante*, p. 262.

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same degree the interest of every State to force its definition of the word upon those who, without residing in or being subject to it, temporarily invoke its assistance and authority to celebrate the contract, and constitute the relation. The *lex domicili*, therefore, is rightly allowed to decide everything that relates to the marriage contract, except the forms of ceremonial ; but with regard to other and ordinary contracts, the law of the place of performance has no title to a similar privilege. There are no analogous reasons of expediency and morality for permitting its supremacy in a contract, for example, of ordinary partnership ; and the local law of a foreign country may rightly claim to say what shall be a sufficient cause to divorce the wife of one of its domiciled citizens, without thereby asserting its right to regulate the liabilities, *inter se*, of those merchants trading in it who entered into their contract of partnership in England. Accordingly, the general principle, to which we have seen that the contract of marriage is an exception, has met with almost universal acceptance ; and it is clear that the *vinculum* or legal tie, which results from a contract, is dependent solely upon the law by which the parties intended that it should be constituted. And here the distinction indicated by Sir R. Phillimore, in *The Patria* (a), may be usefully referred to. All contracting parties do expressly contemplate one thing, *i.e.*, the performance of the contract. But the obligation which is created between them does in many cases, and may in all, involve certain consequences which were not as a matter of fact within their contemplation. Accidents which were unforeseen, as well as events foreseen but misunderstood, frequently bring about a state of things which the parties did not think of providing for ; and it becomes absolutely necessary, in order to ascertain their respective rights and liabilities, to inquire by what law the nature and incidents of the obligation are determined. In other words, to what law must the parties be assumed to have submitted themselves ? what law must

(a) L. R. 3 A. & E. 462.

they be assumed to have had in their minds when they contracted? It is obvious that there may be a distinction between the considerations applicable to events not contemplated by the contract, and those applicable to events not only contemplated but expressly provided for. It is proposed to treat of the first branch of the subject under the present heading, and to defer the latter until the proper place for considering the question of performance.

With regard, then, to the nature of the obligation itself, and to the incidents which arise in the course of its development, there must be some one law which the parties intended to be referred to, should necessity arise. This law is determined in different cases by different considerations, but the rule most generally adopted undoubtedly is, that the law of the place where a contract is made must govern the relation which arises out of it. This is not the rule, however, because of any inherent right or obligatory force in that law, but because that is the law to which the *intention* of the parties must *prima facie* be supposed to have looked. Thus, in the *Peninsular and Oriental Steam Company v. Shand* (a), where the contract was made in England for the carriage of a passenger with luggage from Southampton to the Mauritius, and it was contended that the liability of the carriers was governed by the French law in force there, it was said by *Turner*, L.J., in delivering the judgment of the Privy Council, "The general rule is that the law of the country where a contract is made governs as to the nature, the obligation, and the interpretation of it. The parties to a contract are either the subjects of the power there ruling, or as temporary residents owe it a temporary allegiance; in either case equally they must be understood to submit to the law there prevailing, and to agree to its action upon their contract. . . . Their Lordships are speaking of the general rule; there are, no doubt, exceptions and limitations on its applicability, but the present case is not affected by

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these." The nature of these exceptions and limitations is indicated more clearly in the judgment of the Exchequer Chamber in *Lloyd v. Guibert* (a). "It is generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought to prevail in the absence of circumstances indicating a different intention. As for instance, that the contract is to be performed elsewhere, or that the subject-matter is immovable property situate in another country, and so forth; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general ones, by reason of the circumstances indicating an intention to be bound by a law different from the place where the contract is made." It is, of course, unimportant whether these cases for the application of a different law are to be regarded as exceptions to the general rule in favour of the *lex loci contractus celebrationis*, or as applications of a distinct principle in favour of the law of the place of performance. Both rules are consequences of the one primary principle, that the intention of the parties is to be followed in all matters with which it has a right to deal. That this primary principle is more especially applicable to incidents of the obligation which were not contemplated or provided for by the parties, is well shewn by another passage from the same judgment. "In determining a question between contracting parties, recourse must first be had to the language of the contract itself; and (force, fraud, and mistake apart) the true construction of the language of the contract is the touchstone of legal right. It often happens, however, that disputes arise, not as to the terms of the contract, but as to their application to unforeseen questions, which arise incidentally or accidentally in the course of performance, and which the contract does not answer in terms, yet which are within the sphere of the relation established thereby, and cannot

(a) L. R. 1 Q. B. 115, 122.

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be decided as between strangers. In such cases it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather to what general law it is just to presume that they have submitted themselves in the matter. A familiar illustration of this will be found in the rule, that the lawful usages of a market are as much part of a contract entered into there, which does not expressly exclude them, as if they were set down at large. The binding force of such usages does not depend so much upon the knowledge of the parties *as upon implied acquiescence; for whoso goes to Rome must do as those at Rome do.* So, in the absence of express provision or special usage, the general law itself, in many points of view only a more extended usage, supplies the gaps which the parties have left, and in doing so sometimes modifies the construction of general words in the contract."

So far as unforeseen incidents of the obligation are concerned, the principle appears plain enough; and it is clear that the law will generally have to supply the defective intention of the parties by presuming some law to have been intended generally; but accepting it as a general rule that contracts are governed, in the development of their incidents subsequent to the making, by the law of the place of celebration, it must be remembered that is a rule peculiarly open to exceptions. The intention of the parties is the crucial test, and in contracts of affreightment, for example, it has been decided that the intention of the parties is to submit themselves to the law of the ship's flag, so far, at least, as sea damage and its incidents are concerned. The principle seems, indeed, applicable to all unforeseen incidents of the obligation save those which arise out of performance. *Lloyd v. Guibert* (a) was a case in which the contract of affreightment was a charterparty entered into at St. Thomas, a Danish West India island, between a British subject as charterer and the master, acting for the French ship-

Exceptions of
*lex loci
celebrationis.*

Contracts of
affreightment.

(a) L. R. 1 Q. B. 115.

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owners, of a vessel then at St. Thomas, for a voyage from St. Marc in Hayti to Havre, London, or Liverpool (ultimately the latter), at the charterer's option. On the voyage to Liverpool the ship had to put into a Portuguese port for repair, and the captain there gave a bottomry bond upon the ship, freight, and cargo. On the ship's arrival at Liverpool, the holder of the bond sued upon it in the Court of Admiralty. The ship and freight were insufficient to satisfy the bond; and the deficiency with costs fell on the plaintiff as owner of the cargo, for which he sought indemnity against the defendants, the French shipowners. By the law of France, abandonment of the ship and freight absolved the defendants from all further liability on the contract of the master, and they had in fact so abandoned the ship and freight to the plaintiff as owner of the cargo. By the English law, they would have been liable to indemnify the plaintiff, notwithstanding the fact of such abandonment. It was contended for the plaintiff that the decision ought to proceed either (i.) upon what was called the "general maritime law," as regulating all maritime transactions between persons of different nationalities at sea; (ii.) upon the Danish law, as the *lex loci celebrationis*, the law of the place where the contract was made; (iii.) upon the Portuguese law, as the law of the place where the bottomry bond was given (though it is difficult to see how this could have been called in to regulate the rights of the parties on a contract made before the ship came into a Portuguese port, and without any expectation of her doing so); or (iv.) the English law, as being that of the place of final performance by the delivery of the cargo, the *lex loci solutionis*. By all these laws the liability of the defendants was established. The French law alone was relied on on behalf of the defendants; and it was contended that this law must be applied either because the character of the transaction itself shewed that the plaintiff impliedly submitted his goods to the operation of the law of the ship, and therefore contracted with reference to it; or else upon the ground

that the master, who entered into the contract (although in doing so he acted within the scope of his authority from the owners), was disabled by the French law from binding his owners, otherwise than with the exception, expressed or implied, of exemption from liability after abandonment, and that the French flag was sufficient notice of such disability. It was held that the parties must, under the circumstances, be taken to have contracted with reference to the law of France, and not to that of the place where the contract was made (the Danish), or to the law of England as the place of performance. The general rule was laid down by Willes, J., that where the contract of affreightment does not provide otherwise, then as between the parties to such contract, in respect of sea damage and its incidents, the law of the ship must govern; and it was said that this rule was not only in accordance with the probable intention of the parties, but also most consistent, intelligible, and convenient to those engaged in commerce. The judgment of the Exchequer Chamber, delivered by Willes, J., after laying down the general rule, that the question is in such cases by what law the parties intended that the transaction should be governed, or rather to what law it is just to presume that they submitted themselves, proceeded as follows:—

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"In the diversity or conflict of laws, which ought to prevail, is a question that has called forth an amazing amount of ingenuity and many differences of opinion. It is, however, generally agreed that the law of the place where the contract is made, is *prima facie* that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immovable property situate in another country, and so forth; which latter, though sometimes treated as distinct rules, appear more

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properly to be classed as exceptions to the more general one, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made; which intention is inferred from the subject-matter and from the surrounding circumstances, so far as they are relevant to construe and determine the character of the contract.

"The present question does not appear to have ever been decided in this country, and in America it has received opposite decisions equally entitled to respect (a). We must therefore deal with it as a new question, and endeavour to be guided in its solution by a steady application of the general principle already stated, viz., that the rights of the parties to a contract are to be judged of by that law by which they intended, or rather by which they may justly be presumed to have bound themselves.

"We must apply this test successively to the various laws which have been suggested as applicable; and first to the alleged general maritime law.

"We can understand this term in the sense of the general maritime law, as administered in the English Courts, that being in truth nothing more than English law, though dealt out in somewhat different measures in the Common Law and Chancery Courts and in the peculiar jurisdiction of the Admiralty; but as to any other general maritime law by which we ought to adjudicate upon the rights of a subject of a country which by the hypothesis does not recognise its alleged rule, we were not informed what may be its authority, its limits, or its sanction. Passing over the common ground of ethics and the elementary ideas of natural law (*jus gentium*) such as the rights of prior occupancy and self-preservation, the privileges and exemption of necessity, the common duties of humanity, of more or less perfect obligation, the idea of property, including the obligation of contracts, and those obligations for the most part conventional upon which is based the modern system

(a) *Arayo v. Currell*, 1 Louis. Rep. 528; *Pope v. Nickerson*, 3 Story, Rep. 465.

of international law (*jus inter gentes*): inasmuch as these supply no precise rule for the matter in hand—it would be difficult to maintain that there is, as to such questions as the present, depending in a great measure upon national policy and economy, any general in the sense of universal law, binding at sea, any more than upon land, nations which either have not assented or have withdrawn their assent thereto.

"Moreover we are not satisfied that there is any such general concurrence of mankind, that shipowners should be absolutely answerable personally for the acts of the master. Pothier (*sur la Charte-partie*, part 1, No. 34) was cited in the affirmative, and Emerigon (*Contrat à la grosse*, c. 4, s. 11) upon the negative rule. Pothier, founding his interpretation upon the civil law *de exercitoria actione* (see *Valin sur l'Ordonnance*, liv. 2, tit. 8, art. 2), thought that the clause of the celebrated *Ordonnance de la Marine* of 1681 (liv. 2, tit. 8, art. 2), from which Art. 216 of the *Code de Commerce* was taken, applied only to illicit acts of the master, and that upon his contracts the owner was liable and could not get rid of liability by abandonment. Emerigon on the other hand, founding his opinion upon the general rule of maritime law as he understood it, thought that from liability for all acts of the master, whether licit or illicit, including contracts, the owner could free himself by abandonment. The jurisprudence of the Court of Cassation leant towards the opinion of Pothier, and that led in 1841 to the modification of Art. 216 to its present shape, by which, according to the statement of the learned annotator in *Sirey's Code de Commerce annoté*, by Gilbert, note 18 upon Art. 216, the opinion of Emerigon is now established in France. To this may be added that similar, though not identical provisions, for the protection of the owner are to be found in other Codes, for instance, that of Spain (*Código de Comercio*, Art. 621, 622) and Prussia (*Allgemeines Deutsches Handelsgesetzbuch*, Art. 451, 452, 453, and the following).

"This is sufficient to shew that there is no general

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uniform rule in maritime law upon the subject; indeed, looking at home, there seems little if any difference in principle between the French law under consideration and our own statutory provisions for limited liability in respect of obligations by reason of collision, which latter have now by express enactment been extended to collision between British and foreign vessels (25 & 26 Vict. c. 63, s. 54, *The Amalia* (a)).

"In truth, any general, much more any universal maritime law, binding upon all nations using the highway of the sea in time of peace, except when limited as administered in some Court is easier longed for than found. Accordingly, we observe that both the very learned Judge of the Court of Admiralty and the Judicial Committee of the Privy Council, in deciding, in the case of *The Hamburg* (*Duranty v. Hart* (b)) that the validity of a bottomry bond given in a foreign port was to be determined by the general maritime law, and not by the law of the ship or the port where the bond was given, added to the expression 'the general maritime law,' this qualification, viz., 'as administered in England.' That case was cited as an authority, and at first sight it appeared to be one for applying English law to the present case, but upon consideration it appears altogether distinguishable. The alleged agency of the master in that case was founded upon necessity alone, and it was incumbent upon the bondholder to establish such necessity by evidence; and in order to do that he was bound (according to the rule prevailing since the case of *The Bonaparte* (c)) to shew a communication with the owner of the cargo, that being, as the Court held, reasonably practicable. So that the *lex fori* was undoubtedly supreme upon the question which then arose, it being one of evidence and procedure. Had the decision been intended to go further, the Judicial Committee of the Privy Council would probably have con-

(a) 1 Moo. P. C. N.S. 471; 32 L. J. P. & A. 191.

(b) 2 Moo. P. C. N.S. 289; 33 L. J. P. & A. 116.

(c) 8 Moo. P. C. 459.

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sidered and compared the case of *Cammell v. Sewell* (*a*), and pointed out the distinction in this respect between a hypothecation in case of necessity, and a sale in case of necessity, which, according to the decision of the majority of the Court in *Cammell v. Sewell*, against the opinion of *Byles*, J., depends for its validity upon the law of the place where the sale was made, and not the general maritime law as administered in England; upon which, however, we offer no opinion.

"In one other point of view the general maritime law as administered in England or (to avoid periphrasis) the law of England, viz., as the law of the contemplated place of final performance or port of discharge, remains to be considered. It is manifest, however, that what was to be done at Liverpool (besides that it might at the charterer's option have been done at Havre) was but a small portion of the entire service to be rendered, and that the character of the contract cannot be determined thereby. It is true that as to the mode of delivery, the usages of Liverpool would govern, as those of Algiers did in *Robertson v. Jackson* (*b*), and as in the mode of taking on board the cargo the usage of the port of loading would be regarded (see *Hudson v. Clementson* (*c*), and the custom set out in the pleadings in *Gattorno v. Adams* (*d*), which custom was proved at the trial at Guildhall sittings after Michaelmas term, 1862, and made an end of the case). And in this point of view it seems impossible to exclude the law of England, or even that of Hayti, from relevancy in respect of the manner of performing that portion of the service contracted for which was to be rendered in their respective territories; because the ship must needs, for the time being, conform to the usages of the port where she is, and for a like reason the adjustment of a general average at the port of discharge, according to the law prevailing there, is binding upon the shipowner and the merchant, who must

(*a*) 5 H. & N. 728; 29 L. J. Ex. 350.

(*b*) 2 C. B. 412.

(*c*) 18 C. B. 213; 25 L. J. C. P. 234.

(*d*) 12 C. B. N.S. 560.

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be taken to have assented to adjustment being made at the usual and proper place, and as a consequence according to the law of that place (*Simonds v. White* (a)).

"It is unnecessary, however, to discuss this point further, because we have been anticipated and the question set at rest in an instructive judgment of the Judicial Committee, delivered by the Lord Justice Turner, since the argument of the present case in that of the *Peninsular and Oriental Company v. Shand* (b), where a passenger in an English vessel from Southampton to Mauritius, where French law prevails, sued the shipowners for the loss of his luggage upon an alleged liability by the French law, from which liability the shipowner was exempt by the English law; and the passenger obtained judgment in his favour in the Mauritius Court, which judgment was reversed upon appeal by the Judicial Committee, their Lordships holding that the law of England governed the case.

"Next, as to the law of Portugal: the only semblance of authority for resorting to that law, as being the law of the place where the bottomry bond was given, is the case already referred to of *Cammell v. Sewell* (c), and we consider that the judgment in that case, if applicable at all, as to which we say nothing, could only affect the validity of the bottomry, and not the duties imposed upon the shipowner towards the merchant by the fact of the bottomry, which duties must be traced to the contract of affreightment and the bailment founded thereupon.

"The law of Hayti was not mentioned nor relied upon in argument, and there remain only to be considered the laws of Denmark and of France, between which we must choose.

"In favour of the law of Denmark there is the cardinal fact that the contract was made within Danish territory, and further that the first act done towards performance was weighing anchor in a Danish port.

"For the law of France, on the other hand, many practical

(a) 4 B. & C. 805.

(b) 3 Moo. P. C. N.S. 272.

(c) 5 H. & N. 728; 25 L. J. Ex. 350.

considerations may be suggested; and first, the subject-matter of the contract, the employment of a seagoing vessel for a service, the greater and more onerous part of which was to be rendered upon the high seas, where for all purposes of jurisdiction, criminal or civil, with respect to all persons, things, and transactions on board, she was as it were a floating island, over which France had as absolute and, for all purposes of peace, as exclusive a sovereignty as over her dominions by land; and which, even whilst in a foreign port, according to notions of jurisdiction adopted by this country (18 & 19 Vict. c. 91, s. 21; 24 & 25 Vict. c. 91, s. 9) and carried to a greater length abroad (*Ortolan, Diplomatie de la Mer*, c. xiii., the work of a French naval officer, but of which a jurist might well be proud), was never completely removed from French jurisdiction.

"Further, it must be remembered that although bills of lading are ordinarily given at the port of loading, charterparties are often made elsewhere, and it seems strange and unlikely to have been within the contemplation of the parties, that their rights or liabilities in respect of the identical voyage should vary, first, according as the vessel was taken up at the port of loading or not, and secondly, if she were taken up elsewhere, according to the law of the place where the charterparty was made or even ratified. If a Frenchman had chartered the *Olivier* upon the same terms as the plaintiff did, it would seem strange if he could appeal to Danish law against his own countrymen, because of the charterparty being made or ratified in a Danish port, though for a service to be rendered elsewhere, by a transient visitor, for the most part within French jurisdiction.

"Moreover, there are many ports which have few or no seagoing vessels of their own, and no fixed maritime jurisprudence, and which yet supply valuable cargoes to the ships of other countries. Take Alexandria, for instance, with her mixed population, and her maritime commerce almost in the hands of strangers. Is every vessel that

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"Again, it may be asked, does a ship which visits many ports in one voyage, whilst she undoubtedly retains the criminal law of her own country, put on a new sort of civil liability at each new country she visits in respect of cargo there taken on board? An English steamer, for instance, starts from Southampton for Gibraltar, calling at Vigo, Lisbon, and Cadiz. A Portuguese going in her from Southampton to Vigo would naturally expect to sail subject in all respects to English law, that being the law of the place and the ship. But if the locality of the contract is to govern throughout, an Englishman going from Vigo to Lisbon on the same voyage would be under English law as to crimes and all obligations not connected with the contract of carriage, but under Spanish law as to the contract of carriage; and a Spaniard, going from Lisbon to Cadiz during the same voyage, would enjoy Portuguese law as to his carriage, and be subject to English law in other respects. The cases which we have thus put are not extreme nor exceptional; on the contrary, they are such as would ordinarily give rise to the question, which law is to prevail? The inconvenience and even absurdities which would follow from adopting the law of the place of contract in preference to that of the vessel, are strong to prove that the latter ought to be resorted to.

"No inconvenience comparable to that which would attend an opposite decision has been suggested. The ignorance of French law on the part of the charterer is no more than many Englishmen contracting in England

with respect to English matters might plead as to their own law, in case of an unforeseen accident.

"Nor can we allow any weight to the argument that this is an impolitic law, as tending to interfere with commerce, especially in making merchants cautious how they engage foreign vessels. That is a matter for the consideration of foreigners themselves, and nothing short of a violation of natural justice, or of our own laws, could justify us in holding a foreign law void because of being impolitic. No doubt the French law was intended to encourage shipping by limiting the liability of shipowners, and in this respect it goes somewhat further than our own; but whether wisely or not is matter within the competence and for the consideration of the French legislature, and upon which, sitting here, we ought to pronounce no opinion.

"Exceptional cases, should they arise, must be dealt with upon their own merits. In laying down a rule of law, regard ought rather to be had to the majority of cases upon which doubt and litigation are more likely to arise; and the general rule that, where the contract of affreightment does not provide otherwise, there, as between the parties to such contract, in respect of sea damage and its incidents, the law of the ship should govern, seems to be not only in accordance with the probable intention of the parties, but also most consistent and intelligible, and therefore most convenient to those engaged in commerce.

"In order to preclude all misapprehension, it may be well to add that a party who relies upon a right or an exemption by foreign law is bound to bring such law properly before the Court, and to establish it in proof. Otherwise the Court, not being entitled to notice such law without judicial proof, must proceed according to the law of England (see *Brown v. Gracey*, note to *Lacon v. Higgins*" (a)).

The principle on which the judgment in *Lloyd v.*

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(a) D. & R. N. P. 41, n. See *infra*, Chap. X. (v.).

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Guibert was given, that contracts of affreightment entered into in a foreign port are made with reference to the law of the ship's flag, so far as the nature and incidents of the obligation are concerned, would probably not have met with the approval of Mr. Westlake. In commenting on an American case (*Pope v. Nickerson*, 3 Story, Rep. 465), decided on facts almost identical with those in *Lloyd v. Guibert*, that writer expresses a strong opinion, first, that the case of a master contracting in a foreign port is the same as if the owner himself were present (which is not questioned), and secondly, that the obligation between the charterer and the shipowner must be measured by the law of the place where the charterparty is entered into (a), or, if by any other law, by the law of the port of delivery, as the place of performance. The American case referred to was that of a vessel, owned in Massachusetts, and engaged in a voyage from Spain to a port in Pennsylvania. On the way she was compelled by stress of weather to put into Bermuda, where the master sold her with the whole cargo; and the question was, what law governed the right of the shipper against the owner to recover the value of his consignment?—i.e., the nature and incidents of the obligation arising out of the contract of affreightment? Judge Story decided in favour of the Massachusetts law, as the law of the flag. "I do not perceive," says Westlake, "what difference the flag makes, since the contract for carriage was neither made nor to be fully executed on the high seas Surely the law to be applied is either that of Spain or Pennsylvania, for the owners must be taken to have contracted in the one country to carry the goods to the other?"

Intention of
parties to
contracts of
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The light thrown upon the true principle by the subsequent decision in *Lloyd v. Guibert* (b), enables the reader to detect the error in Westlake's argument. The assumption is, that the obligation of a contract must be measured by the law of the contract, and that this law can only be the law of the place of celebration, or of the

(a) Westlake, §§ 212, 216.

(b) L. R. 1 Q. B. 115.

place of performance. It has been already shewn (*a*) that this is not the rule. The true rule is, that the obligation of a contract must be measured by the law to which the parties intended to refer, or must be assumed to have submitted themselves (*b*). And this law, though it may be, and most generally is, the law of the place where the contract is entered into, is not so necessarily, or by any *præsumptio juris de jure*, which would be incontrovertible. *Prima facie* it is that law, but evidence is admissible to shew that it is any other. In the words of Willes, J., which have been already cited, "It is generally agreed that the law of the place, where the contract is made, is *prima facie* that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention" (*c*). Now, the essence of the decision in *Lloyd v. Guibert* is that in every contract of affreightment, there are such circumstances (*d*). Contracts of affreightment may be made in half-savage or barbarous ports, or even, to take a more familiar instance, in such places as Alexandria, where it would be absurd to hold that the parties intended their mutual rights to be regulated by the local maritime law of the place of affreightment. It might possibly be convenient to refer in all cases to the law of the port of delivery, as the place of performance; but the fatal objection at once arises that this is a detail which is frequently left uncertain, to be determined either upon signing bills of lading, or upon calling at some named port for orders; as for example in *Lloyd v. Guibert* (*e*) itself, where the vessel was chartered to carry either to Havre, London, or Liverpool, at the charterer's option. The choice of the law of the flag of the vessel, *i.e.*, the law of her owner, appears therefore, as was said in that case,

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(*a*) *Ante*, p. 311.

(*b*) *Ante*, p. 310.

(*c*) *Lloyd v. Guibert*, L. R. 1 Q. B. 115, 122.

(*d*) *The Patria*, L. R. 8 A. & E. 436, was decided by the express stipulations of the contract, and cannot be regarded as an authority for any one competing law.

(*e*) L. R. 1 Q. B. 115.

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"not only in accordance with the probable intention of the parties, but also most consistent and intelligible, and therefore most convenient to those engaged in commerce" (a).

Nor is the case of a contract of affreightment the only one in which the law of the *locus actus* or *celebrationis* is presumed to have been left out of the intention of the parties. Another instance is that of a bottomry bond, given in a foreign port, and sued on in England. The obligation so created, as well as the incidents of the relation arising out of it, was formerly held to be governed by the "general maritime law, as administered in England," and this whether the vessel on which the bottomry bond is given was English or foreign (b). It cannot be said that this position is even now free from some uncertainty and difficulty. The language employed in *Duranty v. Hart*, both by the judge of the Admiralty Court and by the Privy Council, is in itself free from ambiguity, except so far as it is doubtful whether the expression "general maritime law, as administered in England," means English law *simpliciter* or not. But in *Lloyd v. Guibert* (c), on appeal before the Exchequer Chamber, the case was fully discussed, and is there said to be no authority for the law of the place where the contract was made, or for that of the place of performance, but merely an instance of the supremacy of the *lex fori* in matters of procedure and evidence. This conclusion is arrived at by considering that the validity of the bond in that case depended upon the agency of the master, and that the agency of the master, by English law, depended upon the *necessity* of his act; and that therefore the question was one of evidence, inasmuch as the English law did not consider the agency shewn unless it was shewn that the master acted of necessity without communicating with his owner. It

(a) *Ibid.* at p. 129.

(b) *The Karnak*, L. R. 2 P. C. 505; *The Hamburg*, B. & L. 253; *Duranty v. Hart*, 2 Moo. P. C. N.S. 289; B. & L. 253, 819; *The Gratitudine*, 3 C. Rob. 240. As to the meaning of the expression "the general maritime law as administered in England," see *Lloyd v. Guibert*, L. R. 1 Q. B. 125; and *The Segredo*, 1 E. & Ad. 45.

(c) L. R. 1 Q. B. p. 125.

is difficult to assent to the view that this is a question of evidence or procedure. All the facts were admissible, and all were proved; the question was simply as to the validity of the bond. To say that the Court will not recognise its validity, unless some other fact is proved, seems very like demanding to test that validity by its own law, and not by that of the place where the contract was made, or (in *Duranty v. Hart* (*a*)) by the law of the country to which the ship belonged.

It can scarcely be denied, therefore, that the judges of the Privy Council, as well as the judge of the Admiralty Court, considered themselves, in *Duranty v. Hart*, to be following an established principle that the validity of a bottomry bond was to be decided by the general maritime law, as administered in England. Whether this be the correct effect of the case, or whether they were in truth deciding a question of evidence and procedure alone, according to the opinion expressed of their judgment in *Lloyd v. Guibert* is of little consequence (*b*). The simplest and most intelligible view is taken in MacLachlan on Shipping (*c*), that the law actually followed did not govern the case, and that the case must be regarded as overruled by *Lloyd v. Guibert* (*d*). And this was undoubtedly the ground of the later decision in *The Karnak* (*e*), where the Privy Council applied the doctrine of *Lloyd v. Guibert* to the very question at issue in *Duranty v. Hart*, holding that the validity of a bottomry bond, depending upon the action of the master in the foreign port where it was given, must be tested and ascertained, not by the "general maritime law, as administered in England," but by the law of the flag. "It was laid down in *Lloyd v. Guibert*," said Sir William Erle (*f*), "that the captain's authority is derived from, and bounded by, the municipal law of the country to which the ship belongs—that is, by the law of

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(*a*) 2 Moo. P. C. N.S. 289; S.C. *sub nom. The Hamburg*, B. & L. 253; 33 L. J. Ad. 116.

(*b*) L. R. 1 Q. B. 125.

(*d*) L. R. 1 Q. B. 115.

(*c*) At p. 161.

(*e*) L. R. 2 P. C. 505.

(*f*) *Ibid.* p. 512. See the judgment of Willes, J., cited *ante*, p. 315.

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the flag ; and Willes, J., delivering the judgment of the Exchequer Chamber, answers an argument, founded on the supposition of a general maritime law, contradistinguished from the municipal law of this country, by refusing to recognise the existence of a maritime law in that sense. *In accordance with the principle there laid down*, their Lordships consider that the existence of the necessity which validates the hypothecation of cargo by bottomry is to be ascertained by evidence in the usual manner ; and that the meaning of the term ‘necessity’ in respect of hypothecation by the master is analogous to its meaning in other parts of the law.”

It will thus be seen that both in *Duranty v. Hart* (*a*) (*The Hamburg*) (1863), and in *The Karnak* (1869) (*b*), the validity of a bottomry bond given in a foreign Court was tested by English law, or by what Willes, J., declared to be the same thing, the general maritime law as administered in England ; but that in the former case that law was followed because it was the *lex fori*, which, in the case of bottomry bonds sued on in England, was there regarded as supreme ; and in the latter, because it was the law of the flag to which the ship belonged. The principle of *Lloyd v. Guibert*, that the master’s authority is defined and limited by the law of his flag, is therefore now to be regarded as applying to all contracts made by him, and as extending as well to contracts of hypothecation by means of bottomry bonds as to contracts of affreightment. In the words of Blackburn, J., in *Lloyd v. Guibert* (*c*), “So far as regards the implied authority of the master of a ship to bind his owners personally, the flag of the ship is notice to all the world that the master’s authority is conferred by the law of that flag ; and that his mandate is contained in the law of that country, with which those who deal with him must make themselves acquainted at their peril.” An examination of the judg-

(a) 2 Moo. P. C. N.S. 289 ; B. & L. 253 ; 32 L. J. Ad. 116.

(b) L. R. 2 P. C. 505.

(c) 6 B. & S. 117 ; Maclachlan on Shipping, p. 161 ; Kay’s Law of Shipmasters, p. 555 ; *The Karnak*, L. R. 2 P. C. 505.

ment of the Exchequer Chamber in this case (*a*) will shew that the operation of the law of the flag is not confined to the question whether the master had or had not authority to contract at all. It is intended to do more than this; and its right is now asserted to regulate the liabilities and regulations which arise amongst the parties to the agreement, be it of affreightment or hypothecation, upon this principle—that the shipowner who sends his vessel into a foreign port gives notice by his flag to all who enter into contracts there with the shipmaster, that he intends the law of that flag to regulate those contracts, and that they must either submit to its operation, or not contract with him or his agent at all (*b*). To this large extent it must therefore be regarded as an exception to the *prima facie* rule that the nature and incidents of an obligation depend upon the place where the contract is entered into.

The comments in MacLachlan on Shipping (pp. 167, 171) upon the distinction between the law of the ship's flag and the law of the domicil of the owner, are perhaps superfluous. It is true that one or two expressions are used by Story in the American case, to which reference has already been made (*c*), tending to confuse the law of the ship's flag with the law of the owner's domicil; but it must be remembered that in that case the two were identical, and that Story did not mean to pronounce for the law of the domicil as against the law of the flag is evident from several expressions in the judgment. "If the ship is owned and navigated under the flag of a foreign country, the authority of the master to contract for, and bind, the owners, must be measured by the laws of that country" (*d*). "The extent of the master's authority

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Law of the
flag and law
of owner's
domicil in
conflict.

(*a*) Cited *ante*, p. 315.

(*b*) *The Karnak*, L. R. 2 P. C. 505; *Lloyd v. Guibert*, L. R. 1 Q. B. 115; S.C. 6 B. & S. 117; *The Osmanli*, 2 Notes of Case, 322; *The North Star*, 29 L. J. Ad. 73, 76. In the two last cases, however, the facts under consideration were such that the law of the flag was English, i.e., identical with the "general maritime law, as administered in England," advocated by the older decisions.

(*c*) *Ante*, p. 324; *Pope v. Nickerson*, 3 Story, Rep. 465.

(*d*) *Ibid.* p. 475.

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must be limited to the express instructions of the owners, or the law of the country where the ship belongs and they reside . . . If by the law of the domicil of the ship and of the owners the authority of the master is limited to the ship and freight, and does not, in the absence of express instructions, bind the owners personally, it seems difficult to understand how resort can be had to the law of a foreign country, unknown and unsuspected (it may be) by the owners, to expand that authority." In the English case which has been so often referred to (a) there is certainly not even as much leaning as this towards the law of the owner's domicil, which is ignored altogether, although it was there also the law of the ship's flag. The fact that any British subject, wherever domiciled, may sail his ship under the British flag, and have her registered accordingly, as well as the further consideration that most British ships are divided amongst a plurality of owners, are illustrations of the impossibility of accepting the decision of the law of the owner's domicil in place of that of the ship's flag ; and in face of the recent decisions it is most improbable that such a misapprehension will ever find an advocate for the future.

Bill of lading. In *Blanchet v. Powell's Llantwit Collieries Company* (b), the plaintiff sued for freight on a bill of lading made in France, and in answer to a plea that he did not carry all the goods mentioned in the bill of lading, pleaded (*inter alia*) that according to the law of France, the whole freight was payable, although part only of the goods were carried and delivered. The replication was held good, Bramwell, B., saying that as the contract was made in France, the rights and obligations of the parties must be governed by French law. In this case it was suggested in argument that the law of France could not apply to a contract which was to be performed in England ; but except so far as the mode and incidents of the delivery, as part of the performance, is concerned, it is clear that no authority is to be found for applying the *lex loci solutionis*

(a) *Lloyd v. Guibert*, L. R. 1 Q. B. 115.

(b) L. R. 9 Ex. 74, 77.

without a special stipulation to that effect. It was not necessary to decide that the contract of affreightment was governed by French law, inasmuch as the plaintiff was held to be entitled to the lump freight by the law of England also. The reason, however, given for accepting the French law, viz., that the contract was made in France, does not seem to be consistent with the doctrine of *Lloyd v. Guibert* (a), which lays down that the law of the ship should govern as between the parties to a contract of affreightment, in respect of sea damage and its incidents. It is difficult to see why this rule should not equally be applied to the whole obligation of the contract, except so far as the law of the place of performance may properly claim to be heard; but the rule itself was not brought to the notice of the Court in *Blanchet v. Powell's Llantwit Collieries Company*, nor did the nationality of the ship in fact appear to be other than French. The *dictum* is therefore of little importance, except as shewing the general tendency to assume that the law of the place of contract is *prima facie* that intended to govern its obligations and incidents.

The effect and operation of the contract of sale of a ship or cargo in a foreign port is generally considered in connection with the last branch of the subject, and the cases on the point may be here again briefly recapitulated, though they have already been treated of while considering the transfer of personal property generally. The only question which can well arise as to the contract of sale in such a case must be as to its validity, which is not, strictly speaking, part of the nature and incidents of an obligation at all. If a chattel is once duly sold, the property in it is passed once for all, and the obligation momentarily created, being completely fulfilled, ceases to exist. Consequently there can be no opportunity of questioning what law is to govern its future incidents and development. A sale, in fact, partakes more of the nature of an act than of a contract. It is an act preceded—some-

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times only instantaneously preceded—by a contract, with which it is often confounded. There may, of course, be a contract *for* sale, the fulfilment of which is postponed or delayed; but the ordinary sale is intended to operate at once, and is in fact, a mere transfer. As such, there would seem to be but little excuse for testing its validity, in an English Court, either by English law as the *lex fori*, or the maritime general law, if that can be regarded as at all distinguishable from the law administered in all cases in the English Court of Admiralty (*a*). Nor does it appear much more reasonable to refer the question to the law of the ship's flag, which the sale itself in most cases is intended to change. In cases of hypothecation or affreightment, the ship remains under the same flag during the whole existence of the obligation, and the intention of the parties may reasonably be presumed to have included submission to the law of which that flag gave notice. No such intention can be assumed, it is plain, in the case of a foreign purchaser in a foreign port. The ship is a mere chattel, the ownership of which is changed by sale, according to the law of every nation, and directly the ownership is changed, the vessel's nationality is changed with it. It is scarcely probable that the purchaser would expect the validity of the change to be afterwards tested by the law which the transaction purported definitely to abandon.

English mari-
time law—
its authority.

It is, however, only recently that the principle indicated by the foregoing considerations has been recognised, and formerly the obviously incorrect course of preferring the *lex fori* was adopted. In the case of *The Segredo* or *Eliza Cornish* (*b*), the *lex loci actus* was definitely rejected by Dr. Lushington, and English maritime law, regarded as coincident in its application as to those particular facts with maritime law generally, followed in preference. It may be observed that the learned judge, in deciding this case, clearly intimated that he intended to follow, and

(*a*) See *per Willes, J.*, in *Lloyd v. Guibert*, L. R. 1 Q. B. 115, 125.

(*b*) 1 *Eccl. & Ad.* 36.

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conceived himself to be following, the *general* maritime law ; and that he would not have deviated from it by introducing English municipal law, had a conflict arisen between them ; but this distinction has been rendered of less importance by the *dictum* in *Lloyd v. Guibert* (a) as to the non-recognition of any *general* maritime law differing from “maritime law as administered in England.” It is, perhaps, after all merely a distinction of words. Those who advocate the existence and authority of a “general maritime law,” mean in most cases a maritime law which is administered in English as well as in foreign Courts of Admiralty (b). It appears obvious that so much of this general maritime law, as is administered in English Courts, is, by virtue of that very fact, English law ; and it is not the less English because it is common to other foreign Courts of Admiralty as well as that of England. If it is suggested, as Sir R. Phillimore seems to imply, that the sources of its authority differ from those ordinarily cited in English Courts, and that it prevails by virtue of the comity of nations rather than by the binding force of English precedents, the argument appears scarcely warranted by facts. It would be difficult to cite an instance where a foreign decision on an analogous point has been allowed in the English Court of Admiralty to overrule English precedents of earlier date. Reference, it is true, has been constantly made to general European customs, and to regulations such as those contained in the Codes of Wisby and Oléron, but only for the purpose of enlarging the unwritten law of the Admiralty Court of England by analogy and example, and of supplying the deficiencies of its voice, when that was silent. The ordinary common law of the realm has similarly drawn nourishment from the jurisprudence of Rome, but it would be a misnomer to say that the *dicta* of Gaius, or the rescripts of Hadrian, ever spoke with a semblance of authority in English Courts. Authority is given to principles of

(a) L. R. 1 Q. B. 125.

(b) See per Sir R. Phillimore in *The Patria*, L. R. 3 A. & E. 461.

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Transfer good
by *lex loci*.

foreign law or mercantile usage only by their adoption in an English Court.

The decision of Dr. Lushington in *The Eliza Cornish* (a), however, was distinctly overruled by the Exchequer Chamber in *Cammell v. Sewell* (b) in 1860. There the master of a Prussian vessel, chartered in Russia by English shippers for Hull, and wrecked on the coast of Norway, sold the cargo without authority by English law, but under such circumstances that by the Norwegian law an innocent purchaser would have acquired a good title. It was argued that by the law maritime, general as well as English, the master had exceeded his authority, and that the sale was therefore invalid, but it was held (Byles, J., *dissentiente*) that the transaction, being a transfer of personal property, was governed by the *lex loci*; and that the title of the purchaser, being valid by that law, must stand. With regard to the case of *The Eliza Cornish* or *Segredo*, which was relied upon by the owners of the cargo, Crompton, J., delivering the judgment of the Court, said, "If this case be an authority for the proposition that a law of a foreign country of the nature of the law of Norway, as proved in the present case, is not to be regarded by the Courts of this country, and that its effect as to passing property in the foreign country is to be disregarded, we cannot agree with the decision. . . . We think that the law on this subject was correctly stated by Pollock, C.B., in the course of the argument in the court below, where he says that if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere. And we do not think that it makes any difference that the goods were wrecked, and were not intended to be sent to the country where they were sold." (c).

Transfer
distinguished
from
executory
contract.

It has already been said that the decision in *Cammell v. Sewell* is entirely in accordance with the generally

(a) 1 Eccl. & Ad. 36.

(b) 5 H. & N. 728; 29 L. J. Ex. 350; S.C. in Court below, 3 H. & N. 617; 27 L. J. Ex. 447.

(c) 5 H. & N. 744, 745.

accepted theories which refer the validity of a transfer of movables *inter vivos* to the law of the place of transfer (*a*) ; nor is the principle of that case in reality at all inconsistent with the ground of the judgment in *Lloyd v. Guibert* (*b*), which has been so often referred to. The contract to which, in the latter case, the law of the ship's flag, and in the former, the law of the place of contract, was applied, was in truth not the same in any sense. The judgment in *Lloyd v. Guibert* applied the law of the ship's flag to the contract of affreightment made between the master, as agent of the owner in a foreign port, and the shipper ; and *as between these parties*, the law of the flag was held to govern the incidents of the obligation throughout, though its results were varied by circumstances which had been unforeseen. In *Cammell v. Sewell* the relation between the shipowner and the freighters was not in question, and in an action by the owners of the cargo against the master or owner of the ship, the law of the flag might, quite consistently with the decision actually given, have been applied. The contract which was there referred to the local law, and held to be valid in accordance with its provisions, was not the contract between freighter and master, but *the contract of sale* between the master and the purchaser of the wrecked cargo in Norway. It was this contract, and no other, which the Court declared to be binding, because sanctioned and confirmed by the local law, not only upon the parties to it, but upon third persons—strangers, in the strict sense of the term, to its provisions. The proper result of applying the principle of the decision in *Lloyd v. Guibert* to the facts of *Cammell v. Sewell* would be, that the right of the owner of the cargo to sue the shipowner or master for the sale of the goods in Norway would be tested by Prussian law, as the law of the flag alone ; and that it would be no answer to such an action to shew that by Norwegian law the act of the master was justified, or regarded as binding upon shippers and consignees.

(*a*) *Ante*, p. 174.

(*b*) L. R. 1 Q. B. 165.

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If this view be adopted, the strictures in Maclachlan on Shipping upon *Cammell v. Sewell* cannot be supported; and it is noticeable that the Court of Exchequer Chamber, referring to the case in the judgment in *Lloyd v. Guibert*, expressly abstained from expressing any opinion for or against the correctness of the decision. It is suggested by Mr. Maclachlan, that if the Prussian flag was notice to the freighter that the master's authority to bind his employers was limited by Prussian law, it was notice to the Norwegian purchaser of the same limitation. The distinction between an executory contract in which it is necessary that the master should bind those whom he represents and an executed contract of sale, which is in truth completely discharged by the transfer itself, seems to have been overlooked. In the former case the parties must necessarily have contemplated the subsistence of the obligation of the contract, and the performance of its provisions, during a considerable time; and they must therefore be regarded as having intended that some law should regulate the development of the obligation itself, and control the incidents which might arise, but for which it was difficult if not impossible to provide expressly. This law, it has been determined in *Lloyd v. Guibert* (a), is the law of the ship's flag; i.e., the parties must be taken to have assumed that the law of the ship's flag would govern the *future* incidents of the obligation, the master having no authority to undertake that the owners of ship or cargo will do anything, except as defined by that law. But in an absolute and immediate sale, such as that in *Cammell v. Sewell*, the master is not required to pledge his owners to anything. No future relations between the parties are contemplated, and therefore they cannot be taken to have referred to any law to govern the future incidents of the obligation. The master simply contracts to sell the ship or cargo according to the law of the place where they are lying, and he does actually so sell them, while they are there. By the comity of nations—or, to speak more

(a) L. R. 1 Q. B. 115.

correctly, by those principles of international jurisprudence which the law of England, in common with the law of most civilized nations, adopts—a title to property which has once validly accrued according to the law of the situation is good as against all the world (*a*) ; and the purchaser is not to be put in a worse position because the master of the ship has carelessly or improperly mistaken and exceeded his instructions (*b*).

Nor is the doctrine of *Cammell v. Sewell* in itself new or opposed to the general weight of authority. It has already been said that the decision practically overruled the opinion of Dr. Lushington in *The Eliza Cornish* (*c*), but it is opposed to no other authority of any weight, and is in entire accordance with the views expressed by Lord Stowell in the case of *The Gratitude* (*d*) in 1801. "Suppose the case," said Lord Stowell in giving judgment, "of a ship driven into port with a perishable cargo, when the master could hold no correspondence with the proprietor; suppose the vessel unable to proceed, or to stand in need of repairs to enable her to proceed in time. In such emergencies the authority of agent is necessarily devolved upon him, unless it could be supposed to be the policy of the law, that the cargo should be left to perish without care. What is to be done? He *must* in such case exercise his judgment, whether it would be better to tranship the cargo, if he has the means, or to sell it. It is admitted in argument that he is not absolutely bound to tranship; he may not have the means of transhipment; but even if he has, he may act for the best, in deciding to sell; if *he acts unwisely in that decision, still the foreign purchaser will be safe under his acts.*" In *Freeman v. East India Company* (*e*), where the master

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Discretion of
ship's master
—exercise of.

(*a*) *Ante*, p. 176.

(*b*) The contention in *Cammell v. Sewell* that the judicial proceedings in Norway, under which the cargo was sold, amounted to a judgment *in rem*, was rejected by all the judges in the Exchequer Chamber, and has not therefore been here referred to. See *infra*, Chap. XI.

(*c*) 1 *Eccl. & Ad.* 36.

(*d*) 3 *Rob. Ad.* 240, at p. 259.

(*e*) 5 *B. & Ald.* 617 (1822).

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did act unwisely in deciding to sell the cargo, the title of the foreign purchaser was not accepted as good for another reason. The sale took place at the Cape of Good Hope, and it was not shewn that the Dutch law then in force there regarded the sale in at all a more favourable light than the English law would have done, or that there was any conflict between them as to its validity (a). It appeared, besides, that the purchaser was fully aware of the circumstances under which the master sold, and as he was necessarily taken to have been also cognizant of the law, he purchased with his eyes open, so as even to have precluded himself from finding protection under a sale in market overt (b), had the facts amounted to that.

Ship's master
—the agent of
owner.

Before passing from the consideration of maritime contracts made with a shipmaster in a foreign port, it may be remarked that in one point of view, the question is not of the authority given to the master at all, that is, as something distinguished from the intimation afforded by the flag, when the owner is present *in propria persona*. Whether the owner is himself in the foreign port to contract himself, or whether he has sent his shipmaster there to contract for him, the parties to the contract must be equally regarded as contemplating the operation of the law of the flag upon their future relations under the obligation. "The present and like questions," says Willes, J., in *Lloyd v. Guibert* (c), affect not only contracts entered into by masters of ships, the law of whose country distinguishes between the obligations of a contract by the master as such, and that of the owner himself, or his broker, or of the master acting with a plenary authority, but touch all contracts of affreightment entered into in respect of any vessel in a port foreign as to her, whether the master happen to be an owner or not." This principle is obviously a consequence of the natural

(a) See *per Best, J.*, p. 624.

(b) Coke, 2 Inst. 713.

(c) L. R. 1 Q. B. 115, 122.

idea of agency, inasmuch as a man who acts by an agent in a foreign country, acts there himself. In the *Albion Company v. Mills* (a), a Scotch appeal to the House of Lords, the Lord Chancellor said, "If I send an agent to reside in Scotland, and he, in my name, enters into a contract in Scotland, the contract is to be considered mine where it is actually made. It is not an English contract, because I actually reside in England. If my agent executes it in Scotland, it is the same as if I were myself on the spot, and executed it in Scotland." If, therefore, a contract by the master for a ship, as agent for his owner, in a foreign port, is governed by the same rules as if the owner had himself been present; it is plain that when the owner himself is so present, and actually makes the contract in his own name, the law of the flag is to be applied to its future incidents, according to the rule laid down in *Lloyd v. Guibert* (b), just as much as if he had stayed at home.

It need hardly be said that, since the law which is to govern future incidents of a contract must in all cases be a matter of intention, the parties may provide by express stipulation for certain probable contingencies, and declare beforehand to what law their legal consequences are to be referred. Thus, in contracts of marine insurance, it is common to insert a clause that the underwriters are to be liable for general average "as per foreign statement"; and this has been construed to mean, not only that the calculations of the foreign average-stater are to be accepted as correct, but that what is and what is not general average is to be decided by the law of the foreign port where the adjustment is made (c). So, where the underwriters agreed "to pay general average as per foreign statement, if so made up"; which was construed as an agreement to be bound by the opinion and decision of the

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Express
provisions for
contingencies
—General
average.

(a) *Per Lord Lyndhurst*; 3 Wils. & S. 218, 333; 1 Dow & Cl. 342; Story, § 285.

(b) I. R. 1 Q. B. 115.

(c) *Marro v. Ocean Marine Insurance Co.*, L. R. 10 C. P. 414.

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Foreign
statement of
average.

foreign average-stater, both as to facts and law (a). And in another modern case, where the underwriters agreed "to pay all claims and losses on Dutch terms, and according to statement made up by official *dispacheur* in Holland," the voyage being from Java to Holland, it was held that the words expressing the risks insured against were to be construed by Dutch law, and that the average statement by the Dutch adjuster was binding on the underwriters (b). It can scarcely be said that the foreign law in any of these cases can be regarded as the place of performance, as the average loss, and consequently the adjustment, was a contingency which might never have arisen.

The above expressions seem sufficiently clear to shew that the parties effecting the policies of insurance as well as the underwriters, intended their obligation *quoad* the contingencies referred to, to be regulated by the foreign law; but strong evidence is no doubt necessary to shew that the parties to an insurance, effected in England with an English company, have in their minds anything but the English law (c). It is however sufficient to shew a usage to pay losses according to the foreign statement, that being equivalent, when such that the parties are bound by it, to a special agreement (d). And it would seem that this usage, for underwriters to settle according to foreign adjustment, is sufficiently established in English law for it to be binding without an express provision to that effect, according to the authority of Phillips on Insurance (e); but even then, according to the same writer, the foreign law is only entitled to regulate the adjustment, and not to make that an average loss which is not so according to the law of the country where the policy was effected. In *Mavro v. Ocean Marine Insurance*

(a) *Harris v. Scaramanga*, L. R. 7 C. P. 481.

(b) *Hendricks v. Australasian Insurance Co.*, L. R. 9 C. P. 460.

(c) *Power v. Whitmore*, 4 M. & S. 141; *Peninsular and Oriental Co. v. Shand*, 3 Moo. P. C. N.S. 272; *Don v. Lippman*, 5 Cl. & F. 1.

(d) *Neiman v. Cazalet*, Park, Ins. 900, 8th ed.

(e) § 1413, 1414.

Company (a), Blackburn, J., said it was a question that had never been distinctly settled, whether under an ordinary English policy the English underwriter could be compelled to bear what was held to be a general average loss by the law of the foreign country where the adjustment was made, and that express clauses to pay "as per foreign statement" were frequently inserted in policies to avoid that very difficulty. **Power v. Whitmore (b)**, which is said by Westlake to have decided the question in favour of the underwriter, is explained by Cockburn, C.J., in **Dent v. Smith (c)** to have been generally misapprehended, there being no proof in that case that the loss in question was a general average loss even by the law of Portugal, where the adjustment was made. In *Dent v. Smith* the underwriters were held liable to repay moneys to the shippers of gold on board an English ship for Constantinople, which they had been compelled to pay in order to get the gold out of the hands of the Russian authorities at Gallipoli, where the ship had become stranded. After the insurance was effected, and before she sailed, the ship had been transferred to Russian owners, and had duly changed her nationality, a fact of which neither the plaintiffs nor defendants were aware; and this change alone had given the Russian authorities at Gallipoli jurisdiction. It was held that the underwriters were liable, on the ground that the plaintiffs had been compelled to pay the sum claimed as salvage, and were entitled to recover it as a loss by perils of the sea; so that although the case was argued in some respects as one of general average, no light was thrown upon that question.

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The diversities in the law of general average adopted by different nations are so great (*d*), and the advantages promised by uniformity so apparent, that the subject has more than once engaged the attention of reformers.

General
average—
Conflict of
law.

(a) L. R. 10 C. P. 414, 418. *Walpole v. Ewer*, Park, Ins. 898, 8th ed., is often cited as an authority for the affirmative, but may probably be regarded as overruled by *Power v. Whitmore*, and the other cases cited above.

(b) 4 M. & S. 141; Westlake, § 209.

(c) L. R. 4 Q. B. 414, 450.

(d) See the comparative table in Lowndes on Average, p. xxviii.

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Antwerp
Rules.

International Congresses for this purpose have repeatedly been held, at several of which a code of rules has been prepared and recommended for adoption (Glasgow, 1860; London, 1862; York, 1864). A Bill was prepared in 1860–62, which was intended to incorporate the code of rules adopted at Glasgow, but proved ill-adapted for its purpose, and was abandoned. The rules which were drawn up at York were pressed upon the attention of the English Government by the Associated Chambers of Commerce, and repeated attempts made to obtain adoption of them from the Legislature (a); but these attempts were unsuccessful; and in 1877 a revised form of these rules was adopted by the Association for the Reform and Codification of the Law of Nations, at its fifth annual conference at Antwerp, under the name of "The York and Antwerp Rules."

It may be useful to give these *in extenso*.

The York and Antwerp Rules.

1. *Jettison of Deck Cargo.*—No jettison of deck cargo shall be made good as general average.

Every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel.

2. *Damage by Jettison.*—Damage done to goods or merchandise by water which unavoidably goes down a ship's hatches opened, or other opening made, for the purpose of making a jettison, shall be made good as general average, in case the loss by jettison is so made good.

Damage done by breaking and chafing, or otherwise from derangement of stowage, consequent upon a jettison, shall be made good as general average, in case the loss by jettison is so made good.

3. *Extinguishing Fire on Shipboard.*—Damage done to a ship or cargo, or either of them, by water or otherwise,

(a) Report of the Annual Conference (1877) at Antwerp, of the Association for the Reform and Codification of the Law of Nations.

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in extinguishing a fire on board the ship, shall be general average; except that no compensation be made for damage done by water to packages which have been on fire.

4. *Cutting away Wreck.*—Loss or damage caused by cutting away the wreck or remains of spars, or of other things which have previously been carried away by sea-peril, shall not be made good as general average.

5. *Voluntary Stranding.*—When a ship is intentionally run on shore because she is sinking or driving on shore or rocks, no damage caused to the ship, the cargo and freight, or any or either of them, by such intentional running on shore shall be made good as general average.

6. *Carrying Press of Sail.*—Damage occasioned to a ship or cargo by carrying a press of sail shall not be made good as general average.

7. *Port of Refuge Expenses.*—When a ship shall have entered a port of refuge under such circumstances that the expenses of entering the port are admissible as general average, and when she shall have sailed thence with her original cargo or a part of it, the corresponding expenses of leaving such port shall likewise be admitted as general average; and, whenever the cost of discharging cargo at such port is admissible as general average, the cost of re-loading and stowing such cargo on board the said ship, together with all storage charges on such cargo, shall likewise be so admitted.

8. *Wages and Maintenance of Crew in Port of Refuge.*—When a ship shall have entered a port of refuge under the circumstances defined in Rule 7, the wages and cost of maintenance of the master and mariners, from the time of entering such port until the ship shall have been made ready to proceed upon her voyage, shall be made good as general average.

9. *Damage to Cargo in Discharging.*—Damage done to cargo by discharging it at a port of refuge shall not be admissible as general average, in case such cargo shall have been discharged at the place and in the manner customary at that port with ships not in distress.

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10. Contributory Values.—The contribution to a general average shall be made upon the actual values of the property at the termination of the adventure, to which shall be added the amount made good as general average for property sacrificed ; deduction being made from the ship-owner's freight and passage-money at risk of such port charges and crew's wages as would not have been incurred, had the ship and cargo been totally lost at the date of the general average act or sacrifice ; deduction being also made from the value of the property of all charges incurred in respect thereof subsequently to the arising of the claim to general average.

11. Loss of Freight.—In every case in which a sacrifice of cargo is made good as general average, the loss of freight, if any, which is caused by such loss of cargo, shall likewise be so made good.

12. Amount to be made good for Cargo.—The value to be allowed for goods sacrificed shall be that value which the owner would have received, if such goods had not been sacrificed.

The York and Antwerp rules, however, have not received the approval of British underwriters. A joint committee was appointed to consider them, composed of twenty-two members, four representing the committee of Lloyd's, eight the London companies, three the Liverpool underwriters, two the Glasgow underwriters, and one the Australian and New Zealand Underwriters' Association, under a resolution passed at Lloyd's on the 26th June, 1878. In their report this joint committee say that the proposed extension of general average involves a transfer of liabilities belonging to the shipowners to the owners of cargo, and that they do not see on what grounds, either of justice or expediency, such a transfer is in itself desirable. They deprecate on principle the extension of the system of contribution to general average. They acknowledge the immense importance of uniformity, if uniformity could be secured ; but they consider that it is premature to hope even for such uniformity till more is known of

the results of the action of the local committees of the association which met at Antwerp ; and the report concludes with a request to the committee of Lloyd's to adhere at present to their determination not to give their sanction as a corporation to the York and Antwerp rules as at present framed and put forward (a).

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With regard to contracts for carriage or transit by land and sea, it is obvious that it may be often left very doubtful what law was intended by the parties to govern the incidents of the carriage and the contingent liabilities of the carriers. The question arose in *Cohen v. South-Eastern Railway Company* (b), in respect of a contract entered into with an English railway company, at their office at Boulogne, for carriage of a passenger and his luggage from Boulogne, *via* Folkestone, to London. The luggage fell into the sea by the negligence of the defendants' servants, and was so lost ; and the question arose whether the liability of the defendants, who had endeavoured to limit it by a notice on the back of the passenger's ticket, was governed by English or French law. It was ultimately held that they were liable by English law, and as the defendants did not deny that they were so by the law of France, it was unnecessary to decide the question of conflict. Mellish, L.J., however, in the Court of Appeal said, "I confess for my own part that, the contract being made by an English passenger with an English railway company regulated by English law, I should have supposed that it ought to be governed by the law of England, and be taken as made with regard to the law of England. And the more so for this reason, that Parliament having passed Acts to regulate the traffic by both railways and steamboats, when the steamboats belong to the railway company, and there being certain clauses in these Acts for the protection of passengers, I should not be willing to think that the railway company could escape from the stringency of those Acts by having a booking office in a

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carriage by
land and sea.

(a) *Vid. Law Times*, July 13, 1878, p. 202.

(b) L. R. 1 Ex. D. 217; S.C. on appeal, L. R. 2 Ex. D. 253.

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*Cohen v.
South-Eastern
Ry. Co.*

foreign country; the object being to carry a variety of traffic which was intended to be regulated by Parliament by sea and by land" (a). It is plain that the real force of this argument lies in the consideration that the passenger would be the more likely to have contracted with an eye to the English law, because he knew that the company was an English company, subject generally to English law, and that the English Legislature had passed certain Acts which purported to regulate the object for which he was contracting. The judges of the Court of Appeal, however, were by no means agreed upon this inference of intention. Baggallay, L.J., whilst guarding himself against being supposed to be expressing any decided opinion, intimated that it appeared to him that there was much to be said in favour of the law of France (b); whilst Brett, L.J., the third member of the Court, whilst apparently agreeing with Mellish, L.J., that the English law was applicable to the facts of the particular case, where the journey only commenced at Boulogne, thought it probable that if the starting-place had been Paris instead, the first part of the journey at any rate would have been governed by the law of France (c). It has been already pointed out that, in such a case, the law of the place where the contract was made could have no right, as such, to assert its supremacy. The real question would be, looking at all the circumstances of the case, the thing to be done, the situation of the starting-point, the destination, the intermediate distance, the nationality and domicil of the parties contracting, and the terms of the contract, by what law did the parties intend that the unforeseen incidents of their contract should be governed? It may be remarked that in the particular case under discussion, the passenger had accepted a ticket, the conditions on the back of which referred to the company's bye-laws; and inasmuch as these bye-laws derived their force and authority from the English legislature,

(a) L. R. 2 Ex. D. 259, 260.

(c) *Ibid.* p. 262.

(b) *Ibid.* p. 261.

this would seem a strong argument to shew that the parties ought to have intended that the law of England should govern the whole transaction (*a*). There is, however, another principle applicable to the case which has not yet been considered. It will be shewn presently that the manner and extent of the performance of a contract are referred almost universally to the law of the place where the contract is to be performed. The contract of a carrier is performed in the place where he carries, not in the place whence he starts, or to which he is destined. It may reasonably be contended that he contracts to carry in the manner authorized by, and with the liabilities for negligent carriage imposed by, the law of the country through which the transit is made; and that in such a journey as that supposed, from Paris to London, the French law would apply during the first portion, by railway from Paris to Boulogne; and the English law during the remainder, when the passenger and his luggage was on English soil, or on board an English ship. "Whether that part of the contract which has to be performed in France," said Brett, L.J., in *Cohen v. South-Eastern Railway Company* (*b*), "must in strictness be said to be performed according to French law, I know not." It would certainly not be inconsistent with principle, and it is doubtful if it would even be inconvenient in practice, to consider that the parties intended the liability of the carrier to vary according to the law of the country through which the transit was made, having regard to the fact that the ordinary and established means of conveyance in both countries were made use of. The inference of intention would of course be quite different if the contract was one to carry by private and special means through several jurisdictions, and it cannot be too frequently repeated that the question of the law applicable is one of intention alone. And this is the ground upon which the

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Carrier's
liability.

(a) See *Peninsular and Oriental Co. v. Shand*, 3 Moo. P. C. N.S. 272, 291.

(b) L. R. 2 Ex. D. 253, 263.

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Carrier's
contract—by
what law
governed.

decision of the Privy Council in *The Peninsular and Oriental Company v. Shand* (a) must be taken to have proceeded, where it was held that the carrier's liability, the agreed carriage being from Southampton to Mauritius, *via* Alexandria and Suez, was governed by English law and not by the law of France, which was in force at the place of destination. The carriers in that case were an English company, the passenger being also English by nationality and (apparently) domicil, and almost the whole of the transit was to be performed in one of their ships, with the exception of the railway journey across the isthmus of Suez. The effect of the Egyptian law, however, was not alluded to, and nothing in fact turned upon that part of the journey. The Court, in giving judgment, after alluding to the difficulty of saying by what law the nature and obligation of a contract was to be governed, and the conflict of decisions on the question, stated the *prima facie* rule, that the law of the country where a contract was made must generally be taken to govern as to its nature, obligation, and interpretation, and that the parties must be understood as having agreed to submit themselves to it, and proceeded to shew how the intention was directly to be inferred from the facts before them, as follows: "This is a contract made between British subjects in England, substantially for safe carriage from Southampton to Mauritius. The performance is to commence in an English vessel in an English port; to be continued in vessels which for this purpose carry their country with them; to be fully completed in Mauritius; but liable to breach, partial or entire, in several other countries in which the vessels might be in the course of the voyage. Into this contract, which the appellants frame and issue, they have introduced for their own protection a stipulation, professing in its terms to limit the liability which, according to the English law, the contract would otherwise have cast upon them. When they tendered this contract to the respondent, and required his

(a) 3 Moo. P. C. N.S. 272.

signature to it, what must it be presumed that he understood to be their intention as to this stipulation? What would any reasonable man have understood that they intended? Was it to secure to themselves some real protection against responsibility for accidental losses of luggage and for damage to it; or to stipulate for something to which, however clearly expressed, the law would allow no validity? This question leaves untouched, it will be observed, the extent of the contemplated protection; it asks, in effect, was it intended that the stipulation in case of an alleged breach of contract should be construed by the rules of the English law, which would give some effect to it? or by those of the French or any other law, according to which it would have none, but be treated as a merely fruitless attempt to evade a responsibility inseparably fixed upon the appellants as carriers? . . . If their Lordships take the respondent to have understood the intention of the appellants in the first way, they must take him to have adopted the same intention; it would be to impute want of good faith on his part to suppose that with that knowledge he yet intended to enter into a contract wholly different on so important an article; he could not have done this if the intention had been expressed, and there is no difference as to effect between that which is expressed in terms and that which is implied and clearly understood. The actual intention of the parties, therefore, must be taken clearly to have been to treat this as an English contract, to be interpreted according to the rules of English law" (a).

In matters relating to bills of exchange, much difficulty appears to have been felt by the Courts in deciding by what law the nature and incidents of the drawer's, acceptor's, and indorser's contract respectively are to be defined—a difficulty which may be partly due to the want of any clear distinction between the abstract nature of the obligation, which has reference to no particular place (apart from the intention which it is necessary that

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(a) 3 Moo. P C. N.S. 291, 292.

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parties to Bill
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the law should presume), and those incidents which arise from acts and facts to be, if at all, in some particular locality. Westlake, though confessedly here not altogether in accordance with the English authorities, is in favour of referring all questions touching the obligation and liability of the drawer or indorser of a bill of exchange to the law of the place where his contract is made (*a*) ; and cites *Allen v. Kemble* (*b*) to shew that the contracts of the drawer and indorser, as well as that of the acceptor, ought to be determined by the law of the country where the obligation first attached. It must be remarked of the decision in *Allen v. Kemble*, first, that the *dicta* of Lord Kingsdown in the judgment were in reality unnecessary to the case before the Court (*c*) ; and secondly, that the conclusion drawn from them by Westlake (§ 228) is hardly warranted by their actual terms. In *Allen v. Kemble* the assignees of the bankrupt holder of a bill of sale, drawn and indorsed in Demerara, accepted in Scotland, payable in London, sued the drawer and indorser in Demerara instead of the acceptor, in order to avoid a set-off which the acceptor had against the bankrupt holder. By the Roman-Dutch law then in force in Demerara, a surety is entitled to the benefit of any cross claim which the principal may have against the creditor, and the Privy Council held that this law was equally applicable, although the liability of the principal arose in a foreign country. Nothing turned on the law relating to bills of exchange, and the question would have been precisely the same if the action against the parties in Demerara had been brought on a guarantee given by them in respect of goods supplied to a party in England (*d*). The case is simply an illustration of the principle which has already been fully discussed, that the law of the place where a contract is made is *prima facie* that intended to define the contractor's

(*a*) §§ 226, 227.

(*b*) 6 Moo. P. C. 314.

(*c*) See *per Cockburn, C.J., Rouquette v. Overman*, L. R. 10 Q. B. 525, at p. 540.

(*d*) *Per Cockburn, C.J., in Rouquette v. Overman*, L. R. 10 Q. B. at p. 541.

obligation; and that a person entering into a contract of suretyship in Demerara expects and is expected to have all the advantages, if sued upon default of the principal or in his place, that the law of Demerara gives him.^a

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It is in reality by a mere application of this rule, that the liability of a drawer and of an acceptor of a bill of exchange to pay interest, when sued for the amount, has been held to be dependent upon the law of the place where they first assumed liability at all; i.e., where their respective contracts were made. As to the acceptor, this was held as long ago as 1840 by Lord Langdale in *Cooper v. Waldegrave* (*a*); and the same principle has since been applied to the contract of the drawer (*b*). Not merely the liability of the acceptor to pay interest, but his liability to pay at all on his shewing that he had not sufficient effects of the drawer in his hands at the time of the acceptance, was referred in a much older case to the law of the country where the acceptance was given (*c*); and it has been laid down in a modern case, that all questions of the acceptor's liability which have no relation to the manner of performing the contract, or to the consequences of non-performance, depend upon the same law (*d*). So far the presumption, that no law is in the mind of the parties, but the law of the place of contract, is not interfered with. The case assumes a very different form when the incidents of payment, dishonour, protest, and notice, which must necessarily arise at some particular place and in accordance with some particular law, arise to complicate the question.

Rate of
interest on
Bill of
Exchange.

The drawer or indorser of a bill, who by the drawing or indorsement becomes the surety for the due performance of the surety's contract, knows, first, that the payment of the bill must be at the place where it is made payable. Secondly, he knows that the time of the payment, whether

(a) 2 Beav. 282.

(b) *Gibbs v. Fremont*, 9 Ex. 25; 22 L. J. Ex. 302.

(c) *Burrows v. Jemino*, 2 Str. 733; *Wynne v. Callendar*, 1 Russ. 295.
See also *Potter v. Brown*, 5 East, 124.

(d) *Scott v. Pilkington*, 2 B. & S. 11, 44.

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lengthened or not by days of grace, is to be determined of the law of the place where it is made payable; and when it is accepted generally, by the law of the place of the acceptance (a). Now if the bill is not paid according to the law of the place of payment, when presented according to that law, he, the surety, will become liable to be called upon to pay in place of the principal. Before, however, he can be so called upon, certain preliminaries, in addition to presentment and non-payment, must be fulfilled. It is at least reasonable to presume that these incidents of *non-payment* will be governed by the same law that applies to all the incidents of *payment*. It is the acceptor's contract that he guarantees, and he may fairly expect that the performance and the non-performance of that contract will be defined by the same law—the law of the place where it ought to be performed.

In accordance with this principle, and to this extent, it has been held that the obligations of the drawer and indorser, as surety, are to be measured by the same law as the obligations of the acceptor (b). In *Rothschild v. Currie* the bill was drawn in England, accepted in Paris, payable there, and indorsed in England to the plaintiff. Upon the dishonour of the bill by non-payment on presentation, notice was given to the plaintiff in England, and transmitted by him to the defendant, who had indorsed the bill to him. Some delay, however, had occurred about the protest, and the notice to the defendant of dishonour, though in time by the French law, was too late by the law of England. An action having been brought against the defendant as indorser and surety, it was held that the plaintiff was entitled to recover, inasmuch as the notice of dishonour was sufficient by French law, being the law of the place where the payment was to have been made. Both Westlake (c) and Story (d) dissent from this decision, and the ground upon which it was given, considering

(a) Byles on Bills, 11th ed. pp. 398, 399; *Rouquette v. Overman*, L. R. 10 Q. B. 535, 536, 538, 542.

(b) *Rouquette v. Overman*, L. R. 10 Q. B. 525.

(c) Westlake, § 227.

(d) Story on Bills, § 296, n.

that the contract of a drawer or indorser is to be governed by the law of the place where he affixes his name, that being the law which imposes the obligation upon him once for all. The principle of *Rothschild v. Currie* (a) is certainly defensible upon the ground which it has been above attempted to indicate, and has since been followed so often as to stand virtually beyond the reach of criticism. *Hirschfield v. Smith* (b) was a case arising out of similar circumstances, the question being, as in *Rothschild v. Currie*, whether a notice of dishonour was sufficient if given in conformity with the law of the country where the bill was payable only, and it was decided in the same way; not only upon the authority of the previous case, the probable accuracy of which had up to that time been considered questionable, but upon the further ground, that even assuming the indorser's contract to be governed by the law of England, as the place of indorsement, yet the law of England ought to accept as reasonable notice of dishonour such notice as was required by the law of France, where the bill was payable. This is in effect merely what has been said before, that according to English views of private international law, the intention of the indorser must be assumed to have been to bind himself to accept, as reasonable notice of dishonour, notice according to the law of the country where the bill was payable. "The indorser of a bill accepted payable in France," said Erle, C.J., in his judgment, "promises to pay in the event of dishonour in France, and notice thereof. By his contract he must be taken to know the law of France relating to the dishonour of bills, and notice of dishonour is a portion of that law." *Rouquette v. Overman* (c) was a case in which the real question was again that which had been decided in *Rothschild v. Currie* (a), but the circumstances under which the law of the place of payment had postponed the presentation for payment and notice of dishonour were exceptional. The bill was drawn and in-

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dishonour—
sufficiency of.

(a) 1 Q. B. 43.

(b) L. R. 1 C. P. 340.

(c) L. R. 10 Q. B. 525.

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Acceptor of
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dorsed in England, and accepted payable in France, the day for payment according to its tenor being the 5th of October, 1870. Pending the currency of the bill, the German army having invaded France, the Emperor Napoleon issued an edict extending the right of action on all negotiable instruments then current for a month, and deferring payment for that time. After the change of government, similar laws were passed from time to time, and published by the executive for the time being, further extending the period of delay in the case of all current negotiable instruments, the effect of which was ultimately to extend the day of payment of this particular bill to the 5th of September, 1871. On that day it was duly presented, dishonoured, and protested; and notice of dishonour and protest according to the law of France was sent to the English indorsee (the plaintiff), and through him to the defendants, the drawers and indorsees. The plaintiff having paid the amount due on the bill to those to whom he had indorsed it over, sued the defendants, his indorsees, for indemnity; and it was contended that they were discharged, inasmuch as the bill had not been presented for payment at the proper time, according to its tenor, nor had notice of dishonour been then given. It was held, in strict accordance, as is submitted, with *Allen v. Kemble* (a) and *Gibbs v. Fremont* (b) no less than with *Rothschild v. Currie*, that the proper time for payment, and the proper time for notice of dishonour, was the time fixed by the law of the country where payment was to have been made; and that inasmuch as the presentation, protest, and notice of dishonour had all been in strict conformity with the law of France, though eleven months after the date named in the bill, the plaintiff and his indorsees had done all that was required of them, and the defendants were liable upon their contract as indorsees.

The nature and obligation of the contract of the drawer and indorser, and the amount of their liability, being thus determined *prima facie* by the law of the place where

(a) 6 Moo. P. C. 314.

(b) 9 Ex. 25.

they contracted, where there is nothing to shew that a different law was intended, and by the law of the place where the bill is accepted payable, in all matters which relate to performance or non-performance there by the acceptor, it is plain that the acceptor's contract must be measured by similar principles. No case appears to have been discussed in which the acceptor has accepted in one country a bill payable in another; but in analogy with the cases just cited, it would seem that a distinction ought under such circumstances to be drawn between his abstract liability to pay at all under his contract on the one hand, and the incidents, mode, and conditions of payment on the other. The question, whether he ever became bound, would be decided by the law of the place where he entered into the assumed obligation; the question what he became bound to do, by the law of the place in which he became bound to do it. The obligation, however, of the acceptor of a bill of exchange is not in every sense absolute. It is virtually a contract to pay to the payee or his order, if he makes one, that is to pay to an indorsee, if an indorsement is regularly made. The question then arises, what is a regular and sufficient indorsement? In other words, when the acceptor (in his implied contract) used the expression indorsement, what description of indorsement was meant?

In *Trimbey v. Vignier* (a) a promissory note was drawn and indorsed in blank in France, and the action was brought by the indorsee against the maker, who stands, of course, in the same position as the acceptor of a bill of exchange. By the French law, as the Court understood it on the evidence submitted to them, an indorsement in blank was not sufficient to entitle the plaintiff to sue in his own name, and it was held accordingly that he could not do so here. In other words, the contract of the maker of the note was to pay to the payee; or if an indorsement was made according to the law of France, then, and then only, to the indorsee. The question of the

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(a) 1 Bing. N. C. 151.

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right of an indorsee, under an indorsement *not* made according to the law of France, to sue in his own name, was therefore not one of procedure or remedy at all, but touched the very essence of the maker's contract; and was governed by the law of France, where that contract, expressing no intention to adopt the provisions of any other law, was made. It will be observed that in this case the bill was drawn as well as accepted in France; so that the question whether the acceptor's liability to pay on indorsement will be determined by the law of the place of acceptance as such, is left undecided by it. The case of *Lebel v. Tucker* (*a*) was the exact converse. There the bill was drawn, accepted, and, payable in England, the blank indorsement only being made in France, and being ineffectual by French law to transfer the right of action, according to the same view of that law as that taken in *Trimbey v. Vignier* (*b*). It was held, in strict accordance with the principle of the former case, that the contract of the acceptor was to pay to an order valid by the law of England (the place where the bill was drawn and accepted); and that the imperfection of the indorsement according to the law of France, where it was made, was no answer to an action by the indorsee against the acceptor. The *ratio decidendi* of the judgment is given by Lush, J., as follows: "The defence is, that the indorsement was made in France, and is not conformable to the law of France, which requires that the indorsement should bear a date, and express the consideration for the indorsement and the name of the indorsee. The question is, is that any answer to an action against the acceptor of an English bill? . . . The contract on which the present defendant, the acceptor, is sued, was made in England. . . . His contract, if expanded in words, is, 'I undertake, at the maturity of the bill, to pay to the person who shall be the holder under an indorsement from you, the payee,

(*a*) L. R. 3 Q. B. 77.

(*b*) 1 Bing. N. C. 151. But, according to Cockburn, C.J., in *Bradlaugh v. De Rin*, L. R. 5 C. P. 473, 475, the French law was misunderstood by the Court in that case.

made according to the law merchant?" How can that contract of the acceptor be varied by the circumstance that the indorsement is made in a country where the law is different from the law of England? The bill retains its original character; it remains an inland bill up to the time of its maturity, and is negotiable according to English law; and by the English law a simple indorsement in blank transfers the right to sue to the holder. . . . The judgment in *Trimbey v. Vignier* proceeded on the ground that the contract, that is, the contract of the maker of the note, having been made in France, must be governed by the law of France. So here, the contract of the acceptor, having been made in England, must be governed by the English law. It would be anomalous to say that a contract made in this country could be affected by the circulation and negotiation in a foreign country of the instrument by which the contract is constituted. The original contract cannot be varied by the law of any foreign country through which the instrument passes" (a).

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The above reasoning would in itself appear conclusively to shew that the law of the place of acceptance, in that right alone, must determine the validity of any indorsement of a bill; but the subsequent case of *Bradlaugh v. De Rin* (b) has resulted in leaving the question in a most unsatisfactory condition. In the two cases which have just been considered, the place of drawing and acceptance was the same, being in the first France, and in the second England. In *Bradlaugh v. De Rin* the bill was drawn in France and accepted in England. The holder sued upon an indorsement made in blank in France, alleged to be imperfect according to the same view of French law which the preceding cases involved; and the question was thus directly raised, whether the law of the place of acceptance alone was entitled to decide the validity of the transfer. The Court was divided, *Bovill*, C.J., and *Willis*, J., holding that it was not; and that inasmuch as

Indorsement
invalid by
lex loci.

(a) L. R. 3 Q. B. 77, at p. 84.

(b) L. R. 3 C. P. 538; S.C. on appeal, L. R. 5 C. P. 473.

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the bill was drawn and indorsed in France, and the indorsement was insufficient by the French law (according to their view of it) to transfer the drawer's right of action as between the drawer (who was the indorser) and the indorsee, it was also insufficient to give the indorsee any right of action against the English acceptor. It was not noticed by the majority of the Court that this reasoning, if valid at all, was applicable with almost equal force to the circumstances of *Lebel v. Tucker* (a). *Montague Smith*, J., on the other hand, held that as against the English acceptor, the French indorsement, though imperfect by French law, was sufficient; adopting in full the principle laid down in *Lebel v. Tucker*, that the contract of an English acceptor in England was to pay to any order or indorsement of the payee which was valid by the mercantile law of England. The Court being thus divided, the case was carried to appeal, where it went off upon a different ground, leaving the question now under consideration untouched. It had been assumed in all the preceding cases (b) that the French law did in fact absolutely disentitle the holder of a bill of exchange, under a blank indorsement made in France, from suing in his own name, and Articles 137 and 138 of the *Code du Commerce* had been relied on. The Court of Exchequer Chamber, however, were unanimously of opinion that this construction of the French law was wrong, and that it had not been shewn, therefore, that the blank indorsement sued on in *Bradlaugh v. De Rin* was insufficient to pass the right of action even by the law of the place where it was made. It was conceded that such an indorsement effected a procuration, and Cockburn, C.J., after examining the French authorities (c), pointed out that such a procuration entitled the indorsee to sue in his own name, subject only to the contingency that any defence might

(a) L. R. 3 Q. B. 77.

(b) *Trimbley v. Vignier*, 1 Bing. N. C. 151; *Lebel v. Tucker*, L. R. 3 Q. B. 77; *Bradlaugh v. De Rin*, L. R. 3 C. P. 538.

(c) *Code du Commerce*, Arts. 137, 138; Paillet, *Manuel de Droit Français*, ii. 1140, nn. 3-6; Bédarride, *Lettre de Change*, i. p. 430, §§ 321-2.

be used against him which could have been maintained against the indorser. The decision of the majority of the Court below was consequently reversed, but no confirmation was thereby given to the opinion of *Montague Smith*, J., on the question of the conflict of law ; and the judgments given, indeed, seem studiously to have avoided any intimation of the views taken by the judges upon it. All that was decided was that the indorsement was sufficient to give the indorsee a right of action even by French law, and that it was therefore unnecessary to say whether he would have been allowed to sue here if that had not been the case.

The question, therefore, is still in a certain sense open for decision ; *Lebel v. Tucker* (a) being a strong authority on the one hand ; and the decision of the majority of the Court of Common Pleas in *Bradlaugh v. De Rin* (b), *Montague Smith*, J., dissentiente, on the other. The judgment of *Willes*, J., in the latter case proceeded on the ground, as has been said, that an indorsement imperfect by the law of the place where it is made is inoperative as between the indorser and indorsee, and therefore cannot transfer to the latter the right of the indorser to sue the acceptor. This argument was, however, expressly noticed and dismissed as immaterial in *Lebel v. Tucker* (c), when the real question was, it is submitted, correctly pointed out. What did the acceptor contract to do ? to pay on an indorsement good according to the law of England, or only on an indorsement good by that law and also by the law of the particular country where the bill happened to be where the indorsement was made ? It seems reasonable to suppose, in accordance with the reasoning of *Lush*, J., cited above (d), that no other law but that of England could have been in his contemplation. He had no reason, apparently, to assume that the bill would be indorsed in France ; and it might just as well have been carried before indorsement to Vienna or St. Petersburg, in

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Acceptor's
contract to pay
to indorsee.

(a) L. R. 3 Q. B. 77.

(b) L. R. 3 C. P. 538.

(c) L. R. 3 Q. B. at p. 83.

(d) *Ante*, p. 356.

PART III. which case the Austrian or Russian law would have similarly claimed to regulate the validity of the transfer.

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**Assignability
of promissory
notes.**

Closely analogous to the question of the indorsement abroad of bills of exchange, is that of the transfer by indorsement or assignment of promissory notes. Promissory notes made payable to bearer pass from hand to hand in England under a statutory provision (3 & 4 Anne, c. 9), and the contract of the maker, according to English law, is thus to pay to the bearer; i.e., the assignee by mere delivery of the original payee. On the principle of *Lebel v. Tucker* (a) it would therefore seem that the law of the place where the delivery is made is immaterial, and that the bearer has an equal right to sue in England though the transfer to him was by that law ineffectual. And accordingly in *De la Chaumette v. The Bank of England* (b) it was held that a promissory note made in England payable to bearer was transferable by mere delivery in France. It was not, however, shewn or found in that case that the law of France required more than delivery, though it was apparently assumed that it did so.

(a) L. R. 3 Q. B. 77. But see *contrà, Bradlaugh v. De Rin*, L. R. 3 C. P. 538; S.C. L. R. 5 C. P. 473.

(b) 2 B. & Ad. 385; see S.C. 9 B. & C. 208.

And it may be also remarked that in Byles on Bills, this case is cited for the limited proposition that notes or bills payable to bearer, made *and payable* in England, are transferable by delivery abroad, although by the law of the country where the transfer takes place mere delivery is inoperative to pass the right of action (*a*). It is difficult, however, to see how the place of payment is material. A note made in England derives all its assignability from the English law, and it is not apparent why that assignability should be limited because the maker stipulates that he shall only be called upon to pay in a different country. The manner and mode of payment are no doubt measured by that law (*b*), as all other questions connected with the performance of the maker's contract; but his original liability to pay the bearer, to whom the property has passed by proper transfer, has no more to do with performance than his liability to the payee; and the law of the place where his contract is made has as much claim to govern one liability as the other.

It may be remarked that it was held on more than one occasion that the English statute (3 & 4 Anne, c. 9) rendering promissory notes transferable, applied to notes made without the jurisdiction (*c*). Those decisions, however, were simply given upon the words of the statute, which provided that "all notes" should be negotiable in the manner specified; and was interpreted as meaning that, within the jurisdiction, all notes which came under the descriptive words, without regard to the place of their making, should be transferable accordingly. "It is for the advantage of commerce," the Court said in the latter case, "that foreign as well as inland bills should be negotiable." No question of international law is necessarily involved in this interpretation, unless it had been shewn, which it was not, that the law of the country where the

(*a*) Byles on Bills, 9th ed. p. 401; and see *Gorgier v. Micville*, 3 B. & C. 45.

(*b*) *Infrà*, p. 369.

(*c*) *Bentley v. Northouse*, Moo. & M. 66; *Milne v. Graham*, 1 B. & C. 192. See, however, *contrà*, *Carr v. Shaw*, cited in Bayley on Bills, 4th ed. 22.

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accept bill.

note was made absolutely prohibited its negotiability. In a country where such a prohibition existed, a note in such a form as to come within the provisions of the statute would never have been made at all.

It has been seen above (a), that the contract of the acceptor of a bill is to be governed by the law of the place of acceptance, following the *prima facie* rule that contracting parties intend their liability to be regulated by the law of the place where it is created. This doctrine has been extended from the contract of acceptance to the mere agreement to accept. In *Scott v. Pilkington* (b) the action was brought on an American judgment, the original claim in America being against the defendants for breach of a contract made in New York to honour acceptances of third parties, from whom the plaintiffs had purchased bills drawn on the faith of the defendants' promise. The defendants resided in England, and their contract was accordingly to accept the bills there; but the Court of Queen's Bench held that the American tribunal had rightly applied the law of New York to their liability, and that it was therefore unnecessary to decide how far a foreign judgment may be examined for a mistake in English or private international law (c). "The question at issue," said Cockburn, C.J., "has no relation to the manner of performing the contract, or to the consequences of non-performance It is contended that the law of England, as that of the place of performance, ought to prevail. We are of a contrary opinion, it appearing to us that the question of the defendants' liability must be determined by the *lex loci contractus*." It was stated in the course of the judgment that if the promise of the defendants had been given in England, the English law would not have held them liable to third parties who should purchase bills drawn on them for acceptance from the drawers; but that liability was imposed by the law of the place where the contract was made, and it was

(a) *Ante*, p. 352.

(b) 2 B. & S. 11.
(c) *Infrà*, Chap. XI.

held that the American Court had rightly applied that PART III.
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The divergencies in the law of different States relating CAP. VIII. to Bills of Exchange, and the resulting inconveniences, gave rise to considerable discussion at the Bremen and Antwerp Conferences (1876 and 1877) of the Association for the Codification and Reform of the Law of Nations; and it may be of interest to quote the code of rules to regulate this subject which was adopted at the last Conference, as given in the Report for that year of the Association. The subject is to be reconsidered at the Frankfort Conference of 1878. Code of proposed rules for Bills of Exchange.

Principles for an International Law to govern Bills of Exchange.

1. The capacity to contract by means of a Bill of Exchange shall be governed by the capacity to enter into a contract generally.
2. To constitute a Bill of Exchange it shall be necessary to insert on the face of the instrument the words "Bill of Exchange" or their equivalent.
3. It shall not be obligatory to insert on the face of the instrument, or on any indorsement, the words "Value received," nor to state the consideration.
4. Usances shall be abolished.
5. The validity of a Bill of Exchange shall not be affected by the absence or insufficiency of a stamp.
6. A Bill of Exchange shall be deemed negotiable to order, unless restricted in express words on the face of the instrument or on an indorsement.
7. The making of a Bill of Exchange to "bearer" shall not be allowed.
8. The rule of law of *distantia loci* shall not apply to Bills of Exchange.
9. A Bill of Exchange shall be negotiable by blank indorsement.
10. The indorsement of an overdue Bill of Exchange

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which has not been duly protested for dishonour for non-payment shall convey to the holder a right of recourse only against the acceptor and indorsers subsequent to due date. Where due protest has been made, the holder shall only possess the rights of the indorser to him against the acceptor, drawer, and prior indorsers.

11. The acceptance of a Bill of Exchange must be in writing on the face of the Bill itself. The signature of the drawee (without additional words (a)) shall constitute acceptance, if written on the face of the Bill.

12. The drawee may accept for a less sum than the amount of the Bill.

13. In case of dishonour for non-acceptance or for conditional acceptance, the holder shall have an immediate right of action against the drawer and the indorsers for payment of the amount of the Bill and expenses, less discount.

14. The cancellation of a written acceptance shall be of no effect.

15. Where the acceptor shall have committed an act of bankruptcy before due date, the holder shall have an immediate right of action against the drawer and indorsers for payment of the amount of the Bill and expenses, less discount.

16. No days of grace shall be allowed.

17. The holder of a Bill of Exchange shall not be bound, in seeking recourse, by the order of succession of the indorsements, nor by any prior election.

18. Protest, or noting for protest, shall be necessary to preserve the right of recourse upon a Bill of Exchange dishonoured for non-acceptance or for non-payment.

19. Default of notice of dishonour for non-acceptance or non-payment shall not entail upon the holder or other parties to a Bill of Exchange the loss of their right of recourse for the amount of the Bill, but the defaulting

(a) See *Hindhaugh v. Blakey*, L. R. 3 C. P. D. 136, to meet which decision a bill has been introduced into Parliament in the present session (1878).

party shall nevertheless be liable for any damage occasioned by such default. PART III.
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20. The time within which protest must be made shall be extended in the case of *vis major* during the time of the cause of interruption, but shall not in any event exceed a short period of time to be fixed by the code. CAP. VIII.

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21. No annulling clause need be inserted in duplicates.

22. A simultaneous right of action on a Bill of Exchange shall be allowed against all or any one or more of the parties to the Bill.

23. The surety upon the Bill (*donneur d'aval*) shall be primarily liable with the person whose surety he is.

24. The capacity of a foreigner to contract by means of a Bill of Exchange shall be governed by the law of his country ; but a foreigner who enters into a contract of exchange, being incapable of binding himself by such a contract in his own country, shall be bound, if he is capable of binding himself by such a contract under the law of the country in which he contracts.

25. In the foregoing articles the term "Bill of Exchange" shall include "promissory note," where such interpretation is applicable ; but "promissory note" shall not apply to coupons, banker's cheques, and other similar instruments in those countries where such instruments are classed as promissory notes.

Agency.—It has been seen that the obligation of a contract, throughout the incidents of its development, but excluding all questions which relate to performance, depends upon the law to which the contracting parties intended to submit themselves for the purposes of their contract ; and that this law will be, in the majority of cases, the law of the place where the contract was made. When, however, a man contracts by his agent in a foreign country, the question of the extent of that agent's authority, and of the liability of the principal on his agreements, presents itself as a distinct part of the obligation between the principal and the person with whom he has contracted. The Authority of agent.

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Contract by
agent abroad.

cases have been already considered, which relate to the authority of a master of a ship in a foreign port to pledge the credit or property of the owners of ship or cargo (a), or to dispose of either by sale. It was shewn, however, that the rules by which the agency of a ship-master are governed are in themselves peculiar, and not necessarily applicable to the case of an agent who stands in no such exceptional position. The ordinary rule of course is, that the man who contracts in a foreign place by an agent does so in point of law by himself. *Qui facit per alium facit per se.* "If I, residing in England," said Lord Lyndhurst, "send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them" (b). And on this principle it would seem that if once you clothe a man with general authority to represent himself as your agent in a foreign country, those who contract with him there may fairly presume that he is your agent in the sense in which their local law interprets the term. In the absence of anything to indicate a contrary intention, they may be also taken to have supposed that the contract with you as principal, as well as the relation between principal and agent, would be governed by that law. When the agent is the master of a ship, the fact that she flies a foreign flag is, on the principle of *Lloyd v. Guibert* (c), sufficient to indicate an exceptional intention that the obligation of the contract shall not be governed by the local law. In such cases, as before explained, the law of the flag is taken to be that to which both parties have submitted themselves for the purposes of their contract; but in the cases of ordinary mercantile agency there is nothing to indicate a similar intention. It may be added here, that in the case of bottomry bonds at least, it is assumed to have been the intention of the parties that not only the obligation and

(a) *Ante*, pp. 327, 331; *Lloyd v. Guibert*, L. R. 1 Q.B. 115.

(b) *Pattison v. Mills*, 1 Dow & Cl. 342, 363.

(c) L. R. 1 Q. B. 115; *ante*, p. 315; *The Osmanli*, 7 Notes of Case, 322, 335; *The North Star*, 29 L. J. Ad. 73, 76; *The Nelson*, 1 Hagg. Ad. 169; see Brodie's note to Stair's Inst. ii. 955, cited Story, Conflict of Laws, 286 b.

incidents, but the formalities of the contract, should be governed by English law (*a*). The author last cited protests against the attempt to control such cases as those of foreign bottomry bonds by any principles of private international law. English maritime law, according to his view, is not a municipal law at all, and is therefore not included in a subject which treats of the conflict of municipal laws alone; though it is admitted that Story expresses a practical dissent from this view. It is difficult, indeed, to see how it is consistent with any logical classification of law whatever. Municipal law is properly all law, written or unwritten, enacted or adopted by a sovereign State for the use of its own Courts, or developed by those Courts from such enactments and adoptions. Private international law is the system or collection of principles on which the Courts of any particular State act, when one or more foreign municipal laws claim to compete with the municipal law of their own government, and when it is doubtful how far the domestic municipal law which those Courts are primarily bound to obey was intended to apply to the particular circumstances, subject-matter, or persons of the litigation. Theoretically speaking, this system or collection of principles is the same, or should be the same, in the courts of all civilised States; and so far as uniformity is attained or attainable, the subject of private international law approaches to the dignity of a science. According to this view, all principles of law must be either municipal or international, and English maritime law appears plainly to be a compound of both; differing not at all, in this particular, from English mercantile law and many other branches of jurisprudence. It is owing to the nature of its subject-matter that so much of the municipal law contained in it has been borrowed from foreign sources; and that a conflict of municipal laws, to be solved by the principles of private international law, so often arises in its administration. The attempt, however, to treat English maritime law as

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English
maritime law.

(a) MacLachlan on Shipping, p. 166.

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English agent
of foreign
merchant
regarded as
principal.

something anomalous and distinct in itself (a) appears illogical and unnecessary.

With regard to the question of foreign agents, an exception has been grafted by the English mercantile law on the ordinary law of agency, which it will be as well to notice in this place. The rule that an undisclosed principal is liable on the contracts which are entered into by his agent on his behalf, has been held not to be applicable to the case of a foreign constituent contracting by an English commission merchant in this country. "It is well known in ordinary cases, where a merchant resident abroad buys goods here through an agent, that the seller contracts with the agent, and there is no contract or privity between him and the foreign principal" (b). The nature of this exception is better explained in *Armstrong v. Stokes* (c), where it is said by Blackburn, J., delivering the judgment of the Court, "The great inconvenience that would result if there were privity of contract established between the foreign constituents of a commission merchant and the home suppliers of the goods has led to a course of business, in consequence of which it has been long settled that a foreign constituent does not give the commission merchant to pledge his credit to those from whom the commissioner buys them by his order and on his account. It is true that this was originally (and in strictness is perhaps still) a question of fact; but the inconvenience of holding that privity of contract was established between a Liverpool merchant and the grower of every bale of cotton which is forwarded to him in consequence of his order given to a commission merchant at New Orleans, or between a New York merchant and the supplier of every bale of goods purchased in consequence of an order to a London commission merchant, is so obvious and so well known, that we are justified in treating it as a matter of

(a) MacLachlan on Shipping, pp. 166–168; see on this question, *Lloyd v. Guibert*, L. R. 1 Q. B. 125; *The Segredo*, 1 Eccl. & Ad. 45; *The Hamburg*, 33 L. J. Ad. 116; *The Patria*, L. R. 3 A. & E. 461.

(b) *Smyth v. Anderson*, 18 L. J. C. P. 109; 7 C. B. 33.

(c) L. R. 7 Q. B. 598, 605.

law, and saying that, in the absence of evidence of an express authority to that effect, the commission agent cannot pledge his foreign constituent's credit." Both these cases were recognised and adopted in *Hutton v. Bullock* (a), and in the Exchequer Chamber, Keating, J., intimated that the question was not wholly one of fact, inasmuch as the presumption of law was against holding that an English agent had authority so to bind his foreign principal. These cases would no doubt be followed, even though the law of the country where the foreign principal was domiciled, or from which he sent authority to the English agent, imposed upon him the liability which the English law does not. Except in the event of such an additional element for consideration being introduced, the principle on which they rest does not strictly belong to the domain of private international law.

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(3.) *Performance of the Contract.*—The performance of a contract, when a special place for performing it is expressly or impliedly agreed upon, is regulated as to mode, time, and conditions by the law of that place (b). This is of course in accordance with the intention of the parties; for to whatever law they may be presumed to have submitted themselves as far as the formalities of the contract are concerned (c), or the unforeseen incidents which may arise out of the obligation (d), it can hardly be doubted that those who contract that a thing shall be done in a particular place intend it to be done in the manner prescribed by the law of that place, and no other. Where no place of performance is agreed upon, expressly or by implication, the intention is presumed to be that the contract shall be performed where it was entered into, and where the promiser assumed his liability (e). Thus we have seen, in the case of a bill of exchange, that the contract

(a) L. R. 8 Q. B. 331; S.C. L. R. 9 Q. B. 572.

(b) *Per Tindal, C.J.*, in *Trimbey v. Vignier*, 4 M. & S. 695, 704.

(c) *Ante*, p. 275.

(d) *Ante*, pp. 298, 311.

(e) *Don v. Lippman*, 5 Cl. & F. 1, 12, *per Lord Brougham*. It appears from this case that the Scotch law under similar circumstances considers the place of intended performance to be that of the promiser's domicil when the time for performance arrives.

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performance.

of an acceptor or indorser is governed, so far as the time and mode of payment is concerned, by the law of the place where the acceptance was given or the indorsement made (*a*). When, however, a bill is accepted payable at a particular place, the contract of the acceptor is to pay there and nowhere else; and all the incidents of payment, such as the right to an extension of the time by days of grace (*b*), or the sufficiency of notice of dishonour (*c*), are tacitly submitted to the operation of the law of that place. The liability of the debt to carry interest, and the rate at which that will be calculated, will similarly depend upon the law of the place where payment is to be made (*d*); which will be, as already pointed out, the place where the contract for payment was made if no special place of payment was agreed upon. The old cases upon the question of the lawful rate of interest in cases of a conflict of law upon that point, are collected by Westlake (*e*), but have lost much of their importance since the usury laws have been repealed; but it has been decided that in the event of a subsequent contract in consideration of forbearance for a higher rate of interest than that originally stipulated for, entered into in a country whose usury laws differ from those of the place of the first agreement, the law of the place of the new contract will prevail; both in the case where it permits a higher rate (*f*), or imposes a lower rate (*g*), than the law of the original agreement. So a payment of a smaller sum in satisfaction of the whole, though not sufficient to discharge the debtor according to our law (*h*), has been held sufficient to discharge the drawer of a bill, and therefore, it would seem, the ac-

(*a*) *Ante*, pp. 352–355; *Cooper v. Waldegrave*, 2 Beav. 282; *Burrows v. Jemino*, 2 Str. 733; *Potter v. Brown*, 15 East, 124; *Rouquette v. Overman*, L. R. 10 Q. B. 525.

(*b*) *Byles on Bills*, 11th ed. pp. 398, 399.

(*c*) *Rothschild v. Currie*, 1 Q. B. 43; *Hirschfield v. Smith*, L. R. 1 C. P. 340; *Rouquette v. Overman*, L. R. 10 Q. B. 525.

(*d*) *Ferguson v. Fyfe*, 8 Cl. & F. 121; *Ekins v. E. I. Co.* 1 P. Wms. 395; *Thompson v. Powles*, 2 Simons, 194.

(*e*) *Westlake*, § 206.

(*f*) *Conner v. Bellamont*, 2 Atk. (Cas. temp. Hardw.) 382.

(*g*) *Dewar v. Span*, 3 T. R. 425.

(*h*) *Comber v. Wane*, 1 Sm. L. C. 341, and notes.

ceptor, when made in the country where the bill was drawn, and there regarded as a good and effectual accord and satisfaction (*a*). The question of the proper law applicable to the performance of a different kind of contract arose in a case which has already been referred to (*b*), where a railway company had entered into a contract at Boulogne for the conveyance of a passenger and his luggage from that place to London, and it became a question what law was applicable to the carriage. It was not necessary to answer the doubt, as the defendants were confessedly liable for the loss which had occurred by the law of France, and were eventually held to be so by the law of England also; but the necessity, and at the same time the difficulty, of always referring questions relating to the performance of a contract to the law of the place of performance was well indicated by Brett, L.J. "In this case the ticket is taken at Boulogne, and all that has to be done is to be performed on an English steamer and on an English railway. But in cases which occur every day, the ticket is taken in Paris, and the first part of the journey is performed on a French railway; the ticket is taken in Paris at an office, as everybody knows, held by the South-Eastern Company, and on the head of the ticket, like this we have now before us, is 'South-Eastern Railway Company'; therefore the first part of the journey is performed under a contract made between the South-Eastern Company in Paris and an Englishman; but the first part of the journey is to be carried out and performed on a French railway, and the two following parts on an English steamer and on an English railway respectively; and unless you could say that the three were entirely separate contracts, we should be called upon to say what law was to govern the first part of the journey, and whether that first part of the journey was to be ruled by the French law, and the other two by the English law. I, therefore, should find considerable difficulty in saying

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Contract for
carriage
within two
jurisdictions.

(a) *Ralli v. Denistoun*, 6 Ex. 483.
(b) *Cohen v. South-Eastern Ry. Co.*, 2 Ex. D. 253.

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Contract for carriage—law contemplated by parties to.

whether the contract as to the first part of the journey was to be considered as a French contract or an English one" (a). When it is remembered that the question before the Court was as to the legal effect of a condition on the ticket issued by the railway company limiting their liability in the event of loss, it will be seen how strong was the tendency in the mind of the judge to admit the supremacy of the law of the place where the contract was to be performed, even if it became necessary for that object to subdivide the nature of the obligation which was undertaken once for all, and evidenced by a single written instrument. The more correct view is probably that such a question is in reality one of the interpretation of the contract, or at any rate, of the nature of the obligation created by it, and does not properly belong to its performance at all. In such a case it has already been seen that the determination of the question depends *prima facie* upon the law of the place where the contracting parties entered into their agreement (b); and this was in fact the substance of the decision in *The Peninsular and Oriental Steam Navigation Company v. Shand* (c); though in that case the law of England derived an additional claim from the fact that the parties were domiciled British subjects. It has been already pointed out that where the parties to a contract may assume or impose any extent of liability at will, the question of the law applicable to the interpretation of the contract and the nature of the obligation is to be decided by a reference to their intention; and in the case just referred to, it was considered as improbable that British domiciled subjects contracting for carriage from an English port, commencing in an English vessel, could have had any other law in their contemplation but their own. In *Lloyd v. Gubert* (d), an attempt was made to extend the operation of the law of the place of performance even further than the suggestion in *Cohen v. South-*

(a) *Cohen v. South-Eastern Ry. Co.*, L. R. 2 Ex. D. 253, 262.

(b) *Ante*, p. 311.

(c) 3 Moo. P. C. 272.

(d) L. R. 1 Q. B. 115; *ante*, p. 312.

Eastern Railway Company (a). There a French ship was chartered by an Englishman at a Danish port for a voyage from Hayti to Havre, London or Liverpool, at the charterer's option, the option being ultimately exercised by naming the last of those places. On the voyage the ship had to put into a Portuguese port for repairs, where the master gave a bottomry bond on ship, freight, and cargo. The owner of the cargo having had to make certain payments in respect of this bond, sued the shipowners for indemnity ; and the question was, by what law the liability of the shipowners was to be determined, they having abandoned the ship and freight to the shippers, and being thus, according to the law of France, freed from further liability. The law of France, as the law of the ship's flag at the time of the execution of the charterparty, was ultimately held entitled to prevail ; but as none of the other competing laws similarly discharged the defendants, they were all of course put forward in the argument for the owner of the cargo. It was perhaps rather extravagantly contended, that the law of England was entitled to be heard, as the law of the place of the final act of performance by the delivery of the cargo ("quasi *lex loci solutionis*") ; but it is manifest, as was pointed out in the judgment, that the delivery was but a small part of the performance, by which the character of the whole contract could not reasonably be determined ; and it may be added that the law of the place even of full performance has no right to decide the interpretation of the original contract, or the nature of the obligation created, in matters apart from the performance itself. There is nothing *prima facie* in such a contract to shew that the parties to it intended to adopt the law of the locality of performance for any other matters than those which are necessarily connected with it.

The question of illegal performance has already been considered, but it may be convenient to repeat here that —when illegal. when a contract, wherever made, contemplates some act

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or object which is forbidden by the law of the place of intended performance, the contemplated illegality will vitiate the whole agreement *ab initio*. Thus a contract, the performance of which in England, according to its intention, would have amounted to champerty, was held not the less void because made in a country where its object would have been legal, and with a subject of that foreign country (a). If, however, the performance of the contract in the country where that was intended to be done infringes no law, and the contract was made in a country by which its stipulations and consideration were lawful, the agreement is not void because the law of the place of performance would have forbidden the exchange of the particular promise for the particular consideration within its own dominion. Thus a railway company who were forbidden by English statute to depart from a uniform rate of charge for carriage, were allowed nevertheless to contract in Boulogne for the conveyance of "packed parcels" (*colis groupés*) at an enhanced price; such a contract being permitted by the law of France, where it was made, and the conveyance of packed parcels, apart from the previous agreement as to price, being of course not illegal by the law of the place of performance (b). In this case the carriage of the goods commenced, of course, from a French port, and it by no means follows that the company could have contracted in their office at Boulogne or Paris for a carriage which was both to commence and end in English territory. Such a transaction would clearly amount to an evasion of the English law, and it is unnecessary to recapitulate authorities to shew that the comity of nations never requires any law to recognise its own clandestine defeasance.

Adjustment of
average—not
an incident of
performance.

The cases in which general average is calculated according to the law of the port of destination are not, as has been already said, strictly cases which came under the head of performance at all. The effect of a stipulation,

(a) *Grell v. Levy*, 16 C. B. N.S. 73; see *Heriz v. Riera*, 11 Sim. 318.

(b) *Branley v. South-Eastern Ry. Co.*, 12 C. B. N.S. 63.

however, that underwriters are to be liable for average as "per foreign statement" has some connection with this branch of the subject. In such a case, the construction which has been put upon the agreement is, not merely that the calculations of the foreign average-stater are to be accepted as correct; but that the decision of the law of the foreign port as to what is and what is not a general average loss is to be taken as conclusive (*a*), and that the opinion of the foreign average-stater, both as to facts and law, is to bind all parties (*b*). The desirability of establishing uniformity, by international agreement, in the rules applicable to the subject, was much discussed at the annual conference of the Association for the Reform and Codification of the Law of Nations, held at Antwerp in September, 1877. The practical result of this debate, in the shape of a code of rules called the "York and Antwerp Rules," will be found set out above (*c*); but it is of course to be understood that until adopted by the legislature, no such agreement can have the effect of modifying the administration in English Courts of either municipal or private international law.

When a vessel is chartered to deliver cargo at a certain port, the law or custom which prevails at the port of delivery is impliedly adopted for all that is to be done there. Thus, in *Robertson v. Jackson* (*d*), the ship was chartered to take a cargo of coals from the Tyne to Algiers, and there deliver on payment of freight. The charterer engaged that the ship should be unloaded at a certain average rate per day; and that, in the event of further detention, he would pay for such detention at the rate of £5 a day, to reckon from the time of the vessel being ready to unload and *in turn to deliver*. It was proved that, according to the general regulations of the port of Algiers, vessels may commence unloading as soon as they

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(*a*) *Marro v. Ocean Marine Insurance Co.*, L. R. 10 C. P. 414.

(*b*) *Harris v. Scaramanga*, L. R. 7 C. P. 481.

(*c*) *Ante*, p. 342.

(*d*) 2 O. B. 412; *Hudson v. Clementson*, 18 C. B. 213; 25 L. J. C. P. 234.

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enter within the mole ; but that, by a special regulation of the French government, coals destined for the use of the marine department were required to be unladen at a particular spot, and in a given order. It was held by the Court of Common Pleas, that evidence was admissible to shew that the words "in turn to deliver" had by the usage of the particular trade acquired a known meaning in reference to this special regulation with respect to coals for the use of the French marine department, although the shipowner was not cognizant of the fact that the coals had been shipped under a contract with the French government ; and that the special regulation as to the unloading of coals for the French marine department was to be considered one of the regulations of the port, binding upon all vessels entering it. These questions are in fact strictly connected with the *interpretation* of the contract, and the intention of the contracting parties (a).

Contract dis-
charged other-
wise than by
performance.

(4.) *Discharge of Contract.*—The natural end of every contract is in performance or breach ; but under certain circumstances, the obligation may be discharged in a different manner. Such answers to actions on the contract as are in the nature of set-off or counter-claim belong clearly to the head of Procedure, on which the *lex fori* is supreme, and will be subsequently mentioned (b). Defences which arise under statutes of prescription or limitation are more ambiguous in their character, but it will be shewn in its proper place that these matters also are strictly to be referred to the subject of procedure (c), and have nothing to do with any supposed inherent quality in the contract. The question of discharge proper is therefore confined to the cases where the person under the obligation is released from the effect of his promise, and from the necessity of performing it, in a manner not contemplated by the original agreement, nor the mere indirect consequence of the peculiar rules of some particular tribunal as to the proper time and mode of granting a remedy.

(a) *Ante*, p. 301.

(c) *Infrà*, Chap. X.; Story, *Conflict of Laws*, § 576.

(b) *Infrà*, Chap. X.

The instance most commonly given of such a discharge is that which results from the bankruptcy or insolvency of the debtor; but other instances, as, for example, the discharge of a surety by giving time to the principal, may be easily suggested. Tender is in fact a species of performance, and does not come within the present branch of the subject; while the defence of infancy, though referred to by Story under this head (*a*), is really based on an inherent defect in the validity of the obligation, and has been already discussed in its proper place.

With respect, then, to discharge proper, the rule is Discharge by *lex loci* stated by Story to be that a defence or discharge, good by the law of the place where the contract is made or is to be performed, is to be held of equal validity in every other place where the question may come to be litigated (*b*). The loose wording of this *dictum* leaves it doubtful which law is to govern the question of discharge when the contract is made within one jurisdiction to be performed in another; and the same phrase is repeated subsequently, where it is said conversely that a discharge of a contract by the law of a place where the contract was not made or to be performed will not be a discharge of it in any other country (*c*). In the majority of cases where a contract is discharged by bankruptcy, the contract discharged is a contract to pay money *simpliciter*, without any special reference to a particular place of payment or performance; and in those cases the maxim above quoted is well established in English law (*d*). "There is no doubt," said Bovill, C.J., in *Ellis v. M'Henry*, "that a debt or liability arising in any country may be discharged by the laws of that country; and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be

(*a*) Story, Conflict of Laws, § 332; *Male v. Roberts*, 3 Esp. 163.

(*b*) Story, Conflict of Laws, § 331.

(*c*) Story, Conflict of Laws, § 342.

(*d*) *Ellis v. M'Henry*, L. R. 5 C. P. 228; 40 L. J. C. P. 109; *Phillips v. Eyre*, 40 L. J. Q. B. 28; *Gardiner v. Houghton*, 2 B. & S. 743; *Quelin v. Moisson*, Knapp. 265; *Odwin v. Forbes*, Buck, 57; *Potter v. Brown*, 5 East, 124; *Burrows v. Jemino*, 2 Str. 733.

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an effectual answer to the claim, not only in the courts of that country, but in every other country. That is the law of England; and it is a principle of private international law adopted in other countries." And, as a general rule, apart from the question of the validity of a discharge by the law of the place of performance claiming to speak as the *lex contractus*, the converse proposition asserted by Story, that the discharge of a debt or liability by the law of a country other than that where the debt or liability was contracted will not discharge the debtor in any other country, has met with equal recognition in English law (a).

So far the subject has been considered with reference only to the legislation of independent sovereign States; but for English lawyers the case may most frequently arise with reference to the validity in the subordinate jurisdiction, of a discharge created by the law of one country which has a paramount jurisdiction over the territory and tribunals of another. The question will then generally be how far the paramount authority intended to legislate, as it might lawfully do, for the tribunals of the subordinate jurisdiction. In the case of the legislature of the United Kingdom enacting laws which are to be binding upon her colonies and dependencies, a discharge either in the colony or in the mother country may, by the imperial legislature, be made a binding discharge in both, whether the debt or liability arose in one or the other; and a discharge created by an Act of Parliament in England would at any rate be binding upon the Courts of this country, so as to compel them to give effect to it in an action commenced here (b). Thus it was laid down distinctly by Bayley, J., that a discharge of a debt pursuant to the provisions of an Act of Parliament, which is competent to legislate for every part of the United Kingdom, and to bind the rights of all persons residing either in Scotland or in England, and which purported to bind

(a) *Smith v. Buchanan*, 1 East, 6; *Bradley v. Hodges*, 1 B. & S. 375; *Ellis v. M'Henry*, 40 L. J. C. P. 109, 114; *Phillips v. Allan*, 8 B. & C. 477; *Lewis v. Owen*, 4 B. & Ald. 654.

(b) *Ellis v. M'Henry*, L. R. 6 C. P. 228; 40 L. J. C. P. 109.

both classes of persons, operated as a discharge in both countries (a). So an English certificate in bankruptcy has been decided to be a good answer to a debt arising in Calcutta and sued for in the Supreme Court there (b); or to an action on a debt contracted in Ireland and sued for in England (c); or to an action in the Scotch Courts on a debt contracted in Scotland (d). And on the same principle, a discharge under a Scotch sequestration, in pursuance of an Act of the imperial parliament, has been held to be a good answer in an English Court to an action on a debt contracted in England (e). The discrepancy between these cases and the decision in *Lewis v. O'wen* (f) is only apparent. It was held in that case that a certificate under an Irish bankruptcy was no discharge of a debt contracted in England; but the principal question there raised and decided was whether the debt had arisen in England or not. That question being answered in the affirmative, it was no doubt held that the debt was not barred by the Irish certificate; but the paramount effect of the imperial legislation was not and could not have been taken into account, as the Irish bankrupt law at that time in force depended upon statutes of the Irish parliament passed before the union (g). In a later case, where a similar question arose as to the effect upon an English debt of an Irish bankruptcy under the provisions of an Act of the imperial legislature (6 & 7 Will. IV., c. 14), it was held, in accordance with the principles previously stated, that the Irish certificate barred the English debt (h), and a certificate of conformity under the present Irish Act (20 & 21 Vict. c. 60) has the same effect (i). But the discharge effected by the bankruptcy must of

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- (a) *Phillips v. Allan*, 8 B. & C. 447.
- (b) *Edwards v. Ronald, Knapp*. P. C. 259.
- (c) *Lynch v. M'Kenny*, 2 H. Bl. 554.
- (d) *Royal Bank of Scotland v. Culbert, Rose*, 462, 486.
- (e) *Sidaway v. Hay*, 3 B. & C. 12.
- (f) 4 B. & Ald. 654.
- (g) *Per Bovill, C.J.*, in *Ellis v. M'Henry*, 40 L. J. C. P. 109, 115.
- (h) *Ferguson v. Spencer*, 1 M. & S. 987.
- (i) *Simpson v. Mirabita, L. R.* 4 Q. B. 257.

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course be absolute and unconditional, whether the countries whose laws are in conflict are independent sovereign States, or stand in the same position to each other that England occupies with respect to the other members of the United Kingdom. Thus it has been held that a discharge in Scotland by a *cessio bonorum* under the general Scotch law, which only discharged the person of the debtor, was no answer to an action brought in the English Courts for the recovery of an English debt (*a*) ; although, as already explained, the debt would have undoubtedly been held discharged, if the discharge had been given under the authority of an Act of the imperial legislature, as was the case in *Philpotts v. Reed* (*b*), where a discharge in Newfoundland was held sufficient, though the debt had been contracted in England, and the action was brought in an English Court.

The condition, that the debt should have been contracted within the jurisdiction of the paramount State, will not in fact be material, so far as the Courts of that State, and of the jurisdictions subordinate to it, are concerned. "An adjudication of bankruptcy," said Sir J. Colvile in the Privy Council, "followed by a certificate of discharge in this country, under the bankruptcy laws passed by the imperial legislature, has the effect of barring any debt which the bankrupt may have contracted in any part of the world ; and it would have the effect of putting an end to any claims in the island of Barbadoes or elsewhere, to which the appellant might have been liable at the date of the adjudication" (*c*). So Pollock, C.B., says in another case : "A foreign certificate is no answer to a demand in our Courts, but an English certificate is surely a discharge as against all the world in the English Courts. The goods of the bankrupt all over the world are vested in the assignees, and it would be a manifest injustice to take the property of a bankrupt in a foreign country, and then to

(*a*) *Phillips v. Allan*, 8 B. & C. 477 ; *Ex parte Burton*, 1 Atk. 255.

(*b*) 1 B. & B. 294.

(*c*) *Gill v. Barrow*, 37 L. J. P. C. 37.

allow a foreign creditor to come and sue him here" (a). And when the discharge is merely under the local law of a colony or dependency of the British empire, without the authorization of an Act of Parliament, it is plain that it cannot be assumed to operate upon a debt made and to be performed in England (b). "Neither was this debt contracted in Victoria," said Blackburn, J., in the case last cited, "nor to be discharged there, nor is either the plaintiff or defendant stated to be domiciled in that colony. . . . No case has been cited where the act under which the discharge took place was not an act of the imperial legislature; and I therefore conclude that no such case exists. The assertion that, because the colony of Victoria has power to make laws, all laws which it may make have power to bind us in England, sufficiently refutes itself; it is enough to state the proposition." Notwithstanding the allusion in the passage just cited to the domicil of the parties, there appears to be no authority for saying that that circumstance will in any case give universal operation to a discharge of a debt which the rules already explained would refuse to recognise.

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By the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 49, a discharge under an English bankruptcy shall release the bankrupt from all debts provable under the bankruptcy (with the exception of Crown debts and liabilities incurred by fraud or breach of trust); and the English Courts are therefore, of course, directed to accept a plea of an English bankruptcy as an answer to any action or contract, wherever made or wherever to be performed, if the plaintiff's claim was a debt provable under this statute. By s. 31, all debts or liabilities arising out of contract are so provable; so that the foreign creditor of an English bankrupt will lose his right of remedy in an English Court unless he come in to prove his claim. Except, however, in the case of a contract made or to be performed in England, it is clear that a foreign Court could not be

Effect of
English
bankruptcy.

(a) *Armani v. Castrique*, 13 M. & W. 447; 14 L. J. Ex. 86.

(b) *Bradley v. Hodges*, 1 B. & S. 375.

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expected to recognise the English discharge (*a*), upon the principles already explained. The question, how far a particular contract is provable, may sometimes arise with reference to the provisions of the *lex loci contractus* as to its validity; but unless that law declare the contract to be void *ab initio* if certain conditions are not complied with (in which case there would be no contract at all), it is difficult to see how the decision can legitimately be taken away from the *lex fori*. In a modern case before the Court of Appeal in Chancery, the bankrupt, who had been married in Batavia, had by an ante-nuptial contract settled a considerable sum of money on his wife for her separate use. By the law of Batavia no marriage contract excluding a community of goods has any effect as regards third parties until registered in the Courts of that country. The contract in question had never been so registered; but it was nevertheless held that the wife of the bankrupt was entitled to prove against his estate for the sum settled. The ground of the decision was, of course, that the provision of the foreign law as to registration did not affect the validity of the contract, but only the remedy of those claiming under it; and that all questions of the priority of creditors must be determined by the law of the country where the bankruptcy takes place. If it had been held that the debt was not provable, it would of course have followed that the bankrupt's discharge had no effect upon it; and his after-acquired property would still have been subject to the claim (*b*). "The contention is," said Mellish, L.J., "that the effect of the Batavian law is this, that although there is a contract between the husband and the wife, there is none as respects third parties. I have great difficulty in understanding that argument. It is admitted that, as between husband and wife, there is a debt and a binding contract. Then what is the meaning

(*a*) *Smith v. Buchanan*, 1 East, 6; *Bradley v. Hodges*, 1 B. & S. 375; *Ellis v. McHenry*, L. R. 6 C. P. 228; *Phillips v. Allan*, 8 B. & C. 477; *Lewis v. Owen*, 4 B. & Ald. 654; Story, Conflict of Laws, § 348.

(*b*) *Ex parte Melbourn, In re Melbourn*, L. R. 6 Ch. 64: 40 L. J. Bank. 25.

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of saying it shall not be binding as between third parties, or it shall not affect third parties? Surely it only means that in an administration of the assets of the husband in bankruptcy this claim is to be postponed to the claim of all other parties" (a). The latter was, no doubt, the true construction of the Batavian law; and the provision, which thus assumed to govern the remedy alone, was rightly disregarded in an English Court. Had the law of Batavia, on the other hand, provided that a contract entered into without certain prescribed formalities should be void altogether, there can be no doubt that the English bankruptcy law would not have admitted its proof.

The release of a surety by alteration of the contract with the principal debtor furnishes another instance of the discharge of a contract otherwise than by performance, or by the indirect operation of rules of procedure. By analogy with the bankruptcy decisions just cited, such a discharge by the law of the place where the surety entered into his obligation should be accepted in all countries alike. In cases where the surety's contract is to pay in a different country from that where he enters into his agreement, some doubt may be felt; but inasmuch as the discharge by the action of the principals is neither a mode of performance nor a substitute for it, the law of the place where the contract was made seems the proper one to govern. The point is barren of authority, but it is quite clear that the *lex fori* can have nothing to do with the matter; and this inherent liability to discharge is in reality one of the incidents of the obligation which the *lex contractus* claims to decide. It has been already said that this *lex contractus* is selected by the intention of the parties, but that *prima facie* it will be the law of the place where the contract is entered into (b).

(a) L. R. 6 Ch. 69.

(b) The question of the liability of a surety, and its transmission to his heir, is, it may be remarked, the only subject on which any indication is found in Roman jurisprudence of private international law. "The heir of a *fide-promissor*," said Gaius, "is not bound by the contract of suretyship; unless the question of a foreign *fide-promissor* is under consideration, and the law of his State differs from ours on this point" (Gaius, III. 120; see

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novation.

This principle, that the law which was originally intended to govern the nature of the obligation must decide what is and what is not a discharge, is applicable in strictness only to those discharges the liability to which was not necessarily foreseen as an incident of the contract, and which are not brought about by the will and choice of the parties themselves. A contract may, in a certain sense, be discharged by a *novation*; which is not a performance, but may be regarded as an agreed substitute for performance. There can be no doubt that a novation discharging the original obligation, and putting a new one in its place, if made according to the law of the place where performance was intended to take place, would be regarded as valid even in the Courts of the original place of celebration. Nor can any good reason be assigned why equal effect should not be given to a release, extinguishment, or novation made in any other country in accordance with the *lex loci*; except the argument which claims respect for the inherent liability to discharge or the inherent permanence of the original obligation. The inherent nature of the obligation ought, no doubt, to be strong enough to prevail against all incidents of law or fact except the will, expressed in action, of the contracting parties; but they are unquestionably competent to put an end to it whenever they please, and may reasonably suppose that an act or contract according to the forms of the place where they happen to be is the most effectual way of doing so. Accordingly, it is said by Lord Brougham in *Warrender v. Warrender* (a), combating the contention that a Scotch divorce was incompetent to dissolve the marriage in England of a domiciled Scotchman; “in what other contract of a nature merely personal—in what other

ib. III. 96). It is probable, however, that Gaius contemplated the case of a contract made abroad, in the State to which all the parties belonged; and meant merely that in the event of the contract of suretyship coming before the *praetor peregrinus*, he would not adopt the Roman law simply as the *lex fori*.

(a) 9 Bligh, 89, at p. 124.

transaction between men—is such a rule ever applied? such an arbitrary and gratuitous distinction made? such an exception raised to the universal position, that things are to be dissolved by the same process whereby they are bound together; or rather, that the tie is to be loosened by reversing the operation which knit it, but reversing the operation according to the same rules? What gave force to the ligament? If a contract for sale of a chattel is made, or an obligation of debt is incurred, or a chattel is pledged in one country, the sale may be annulled, the debt released, and the pledge redeemed by the law and by the forms of another country in which the parties happen to reside, and in whose Courts their rights and obligations come in question; unless there was an express stipulation in the contract itself against such avoidance, release, or redemption." The word "reside" is used in the passage just cited, but should not be taken as implying any necessity that the parties should be domiciled in the country where the avoidance, release, or redemption takes place. In the case before Lord Brougham, the question was as to the liability to dissolution of a marriage contract, which differs essentially, as has been already pointed out (*a*), from the commercial contracts of every-day life. Such instances as the release of a debt, the redemption of a pledge, or the annulling of a sale, are themselves in the nature of contractual acts; and as to these the law of the domicil of the parties has nothing to do either with their capacity to act or the necessary forms and mode of acting.

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ESSENTIALS OF THE CONTRACT.

Generally, the essentials of a contract are governed by p. 298. that law which the parties intended by their agreement to adopt.

This law, *prima facie*, is the law of the place where the p. 311. contract was made (*lex loci celebrationis*); but may be any

(a) *Ante*, p. 262.

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pp. 301-309.

other which the parties have sufficiently indicated their intention of adopting.

(1.) *The construction and interpretation of contracts* is *prima facie* a matter for the *lex loci celebrationis*, but the object and subject-matter of the contract, the domicil of the parties, and the place of intended performance, may each and all indicate that the parties intended to refer the interpretation of their language to a different law.

pp. 309-369.

(2.) *The nature and incidents of the obligation* are also *prima facie* governed by the *lex loci celebrationis*, as the law which the parties are presumed to have intended to apply to the unforeseen incidents of the *vinculum* or legal tie.

pp. 313, 326.

But in contracts of affreightment and bottomry bonds the parties are presumed to have contracted with reference to the law of the ship's flag, that flag being a notice to all the world of the extent of the master's authority to bind his owners. The validity, however, of a sale by the master of the ship or cargo, in a foreign port, depends upon the *lex loci actus*, which governs the transfer, without reference to the law of the flag.

p. 339.

And where it is expressly or impliedly agreed that any future incidents of the contract shall be governed by the law of the place where they arise, that law will, of course, so far prevail.

pp. 339, 369.

Thus all incidents of performance will be governed by the law of the place of performance.

p. 349.

With regard to bills of exchange, the contract of the acceptor must be measured, so far as the original liability is concerned, by the law of the place where he enters into it; so far as the mode, time, and conditions of payment are concerned, by the law of the place where the bill is payable. The liability of the drawer and indorser, being conditional on default by the acceptor, will depend so far as that condition is concerned, upon the law of the place where the acceptor's contract ought to have been fulfilled. And it seems that the contract of the acceptor, as well as of his surety the drawer, is to pay to an indorsee under

an indorsement valid by the law of the place of acceptance, though this is still doubtful.

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The nature and incidents of a contract entered into by an agent in a foreign place, and the extent of the agent's authority, would also seem to depend, *prima facie*, upon the law of the place where the agent contracts.

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But in contracts of affreightment and hypothecation entered into by a master of a ship, the contract between the owners and freighters is referred to the law of the ship's flag; and *quære*, whether this principle does not extend to all contracts entered into by the master on behalf of the owners?

(3.) *Performance of the Contract.*—Performance or non-performance of a contract, and the consequent dissolution of the obligation, is tested by the law of the place where the contract was intended to be performed.

Quære, whether the unforeseen incidents of the obligation, which arise in the course of performance, are governed by the *lex loci celebrationis* or *solutionis*? *Sembla*, the former, at any rate if any external facts, such as the domicil of the parties, tend to indicate an intention to adopt that law.

The illegality, by the law of the place of performance, of the performance contracted for, invalidates the contract *ab initio*.

(4.) *Discharge of the Contract otherwise than by performance.*—The discharge of a contract, when not the natural result of the agreement, nor the indirect consequence of the rules of the *lex fori* as to the time within which a remedy must be sought, may be effected by the law of the place where the contract was made.

A discharge by the laws or tribunals of a paramount legislature, such as that of the United Kingdom, will bind tribunals of the subordinate jurisdictions, wherever the contract was made, if the paramount legislature intended it to have that effect.

But a discharge, to claim recognition in a foreign Court,

PART III. must be an absolute discharge of the obligation, and not a mere refusal of a remedy.
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CAP. VIII. A contract may also be discharged by a novation or a release, forming a new agreement between the parties, and executed according to the requirements of the *lex loci actus*.
p. 384.

CHAPTER IX.

TORTS.

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—

THE question of the proper law applicable to an action based upon a tort committed abroad, and of the proper *forum* in which that law should be applied, has not arisen so frequently as the corresponding doubt with respect to contracts, but has nevertheless been the subject of late years of careful judicial consideration. It may be conveniently considered under three heads : (i.) jurisdiction with respect to torts, (ii.) the measure of the wrong done, (iii.) the measure of the remedy.

(i.) *Jurisdiction with respect to Torts.*—The formal distinction between local and transitory actions, arising from the old rules as to *venue*, has been already sufficiently considered (*a*) ; and it need only be remarked that it operated upon actions based on tort in exactly the same way as upon actions based on contracts. Thus an action for a trespass or other tort to foreign land was formerly excluded from the English Courts, not on any principle of private international law, but on the technical ground that it was absolutely necessary, for purposes of procedure, that the locality of the alleged grievance should be a country within English jurisdiction, where the action in question could be tried according to English law. This was first definitely held in *Skinner v. East India Company* (*b*), so long ago as 1665 ; but the soundness of the rule was subsequently questioned by Lord Mansfield (*c*), who took a distinction between actions which concerned

(*a*) *Ante*, p. 249.

(*b*) Cited in *Cowp.* 167.

(*c*) *Mostyn v. Fabrigas*, *Cowp.* 180.

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Abolition of
rules of
venue.

the title to or possession of foreign immovables, and actions for personal damages for torts to those immovables. The full effect of the existing rules as to *venue* was not recognised in this expression of opinion, which was distinctly overruled in *Doulson v. Matthews* (*a*). The strictness of the rule, that no action which was local in the contemplation of English law could be brought in an English Court, was thus again established, but on the technical ground of the rules as to *venue* alone. Now that these have been abolished by the Judicature Acts (*b*), the question again appears open for discussion. In a case which was decided after this alteration in the law (*c*), the litigants had by agreement waived any objection to the jurisdiction of the Court that might otherwise have been taken, or the point would have directly arisen. The action was brought by an English company, who owned a pier in Spain, against an English shipowner for damage done to the pier by the vessel coming into collision with it. The pier was of course an integral portion of Spanish soil ; and after laying down the general rule, that no action can be maintained in England for a wrongful act, unless it is wrongful both by English law and by the law of the place where it was committed, Mellish, L.J., proceeded as follows : “ Whether the rule as to wrongful acts to immovable property in a foreign country does not go still further, and prevent an action from being brought at all, is a question which it is not necessary to determine in this case ; because, having regard to the consent of the parties and the agreement that has been come to, no objection to the jurisdiction could be taken.” So it was said by James, L.J., in the same case, that had it not been for the agreement of the parties, very grave difficulties might have arisen as to the jurisdiction of the Court to entertain any action or proceedings whatever with respect to injuries done to foreign soil. That difficulties would arise there can be no doubt, as the abolition of the rules of *venue* has cut away the

(*a*) 4 T. R. 503.

(*b*) 38 & 39 Vict. c. 77; Ord. xxxvi. r. 1.

(*c*) *The M. Moxham*, L. R. 1 P. D. 107.

main ground upon which the earlier decisions on the point were founded; but it is submitted that the result of the change has been to make the reasoning of Lord Mansfield in *Mostyn v. Fabrigas* (a) applicable to its full extent, and to remove all reasons that existed previously from excluding actions for damages in respect of injuries done to foreign immovables from English Courts. So long as the rules as to *venue* remained in force, there was, as Lord Mansfield said, a formal and a substantial distinction between certain actions. The distinction between local and transitory actions was formal—based on the necessities and technicalities of English law, and capable of being modified as it had been created. The substantial distinction was that between actions the object of which could not be attained by an English judgment, and those to which an English writ could give full satisfaction—the former category comprising only those actions which were brought for the title to or possession of immovable property abroad. Actions for personal chattels actually situate within foreign jurisdiction could of course be satisfied if the defendant owner was within the control of an English Court, and were not excluded by any principle of international law like that which hedges the soil of a foreign State with an inviolable sanctity. The formal distinction has now been abolished, and the substantial distinction alone remains; but the substantial distinction never did affect such actions as those now under consideration—actions, that is, not for the title to or possession of foreign immovables, but for compensation in pecuniary damages for injuries done to them, brought against the person of the owner, and to be satisfied out of his movable personal estate. It would therefore seem that no reason now exists on principle why the latter class of actions should not be maintained in an English Court, subject to those rules and restrictions by which all actions for torts committed abroad are governed, and which will be presently stated (b). The *dicta*, however, of the judges in the case of *The M.*

(a) Cited Cowp. 167.

(b) *Infrà*, p. 393.

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Moxham (a), which have just been quoted, shew that the question can from no point of view be regarded as free from doubt.

The question of the jurisdiction of English Courts to try actions based on torts to foreign immovables has thus been shewn to depend chiefly, if not entirely, upon the history of the law of *venus*, and its recent abolition. Personal torts, which were transitory and not local in their nature, were of course not affected by the old restriction. There was at one time, however, another cause which might be regarded as limiting the jurisdiction with respect to certain personal trespasses, as assault. In the form of declaration for assault which was in use before the Common Law Procedure Act, 1852, the assault required to be laid and proved *contra pacem regis*; a condition which of course could not be strictly complied with if it had taken place without the jurisdiction; and Lord Mansfield expressed a doubt whether this would not exclude the competency of the English Courts to try such cases at all (b). So far as this doubt was a technical one, based on the necessities of English procedure, it has of course been removed; nor does it in fact seem to have had any foundation in international principles. "The right of all persons," said Selwyn, L.J., "whether British subjects or aliens, to sue in the English Courts for damages in respect of torts committed in foreign countries, has long since been established, and there seems to be no reason why aliens should not sue in England for personal injuries done to them by other aliens abroad, when such injuries are actionable both by the law of England and also by that of the country where they are committed; and the impression which had prevailed to the contrary seems to be erroneous" (c). Deferring for the present the subject of the measure of the wrong done, or of the remedy available, the question of jurisdiction seems to be put

(a) L. R. 1 P. D. 107.

(b) *Mostyn v. Fabrigas*, 1 Sm. L. C. 658, 600; S.C. Cwp. 161.

(c) *The Halley*, L. R. 2 P. C. 193, 202; *The Amalia*, 1 Moo. P. C. N.S. 484.

beyond all reasonable doubt ; and it may therefore be assumed that an English Court has a right to entertain all actions for personal wrongs, wherever and by whomsoever committed (a), without any breach either of the comity of nations or the technical requirements of English law.

(ii.) *Measure of the wrong done.*—The English Court, having jurisdiction to entertain in the first instance any claim in respect of an alleged foreign tort, has next to ascertain whether the act complained of was in fact unlawful. By what law is it to be guided in so doing ? the law of the country where the act was committed ? or that of England, where the remedy is sought ? The answer to this has already indirectly been given. The action complained of must have been a legal wrong both by the law of the place where it was done, and by the law of England, where the action for damages is brought. “As a general rule,” said Willes, J., delivering the judgment of the Court of Exchequer Chamber in *Phillips v. Eyre* (b), “in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England ; therefore, in *The Halley* (c), the Judicial Committee pronounced against a suit in the Admiralty founded upon a liability by the law of Belgium for collision caused by the act of a pilot whom the shipowner was compelled by that law to employ, and for whom therefore, as not being his agent, he was not responsible by English law. Secondly, the act must not have been justifiable by the law of the place where it was done.” So it is said by Mellish, L.J., in the case of *The M. Moxham* (d) : “The law respecting personal injuries and respecting wrongs to personal property appears to me to be perfectly settled that no action can be maintained in the Courts of this country on account of a wrongful act

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Nature.

Tort must be
actionable by
lex fori and
lex loci.

(a) Except, of course, torts done, authorized, or sanctioned by a sovereign Power ; *Buron v. Denman*, 2 Ex. 167 ; *ante*, p. 104.

(b) L. R. 6 Q. B. 1, 28.

(c) L. R. 2 P. C. 193.

(d) L. R. 1 P. D. 107, at p. 111.

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Tort—when excused by *lex loci*.

either to a person or to personal property, committed within the jurisdiction of a foreign country, unless the act is wrongful by the law of the country where it is committed, and also wrongful by the law of this country." The first part of this condition, that no action can be maintained for an act wrongful by the law of England but legal or legalized by *ex post facto* legislation in the country where it was committed, is the proposition which has most frequently been the subject of debate. In *Blad's Case* (a), Lord Nottingham held that a seizure in Iceland, authorized by the Danish Government and valid by the law of the place, could not be questioned by civil action in England; although the plaintiff, an Englishman, insisted that the seizure was in violation of a treaty between this country and Denmark—a matter for remonstrance between the governments, not for litigation between the subjects. In *Dobres v. Napier* (b), Admiral Napier having, when in the service of the Queen of Portugal, captured in Portuguese waters an English ship breaking blockade, was held to be civilly justified, by the law of Portugal and the law of nations, though his serving a foreign prince was contrary to English law, and subjected him to penalties under the Foreign Enlistment Act. So it was held that the master of an English vessel, indicted for an assault and false imprisonment, who had contracted with the Chilian Government to carry certain banished prisoners from Chili to Liverpool, and had in fact done so, after receiving and imprisoning the prisoners at Chili, could justify his acts under the authority of the Chilian Government in respect of all that had taken place within the local jurisdiction of Chili, but not in respect of the continued imprisonment when the ship had passed out of Chilian waters (c). This was a case of criminal indictment, but the reasons of the decision would of course have been equally applicable to a civil action for false imprison-

(a) 3 Swan, 603; *Blad v. Bamfield*, *ib.* 604.

(b) 2 Bing. N. C. 781.

(c) *R. v. Lesley*, 29 L. J. M. C. 97; Bell, C. C. 220.

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ment or trespass to the person. "We assume," said Erle, C.J., "that the Chilian Government could justify all that it did within its own territory, and we think it follows that the defendant can justify all that he did there as agent for the government and under its authority." In *Phillips v. Eyre* (*a*), the last decision of importance on the subject, the defendant pleaded, to an action for false imprisonment and assault in the island of Jamaica, that since the grievances complained of a retrospective Act of indemnity had been passed by the legislature of Jamaica, and it was held that this was a sufficient answer to the action; although the defendant was at the time the governor of Jamaica, and had assented to the passing of the Act, which could not have become law without his sanction. This case was decided upon demurrer; but in the leading case of *Mostyn v. Fabrigas* (*b*), where an action was brought against the Governor of Minorca for a similar trespass, the justification pleaded by the defendant, that he had acted under the law of the island and solely in his official capacity, was negatived by the jury, and the question of the extra-territorial operation of the local law did not therefore arise. It was, however, accorded an implied recognition by the Privy Council in *Hart v. Gumpach* (*c*). In that case an action was brought, in the British Supreme Court for China and Japan, for false and fraudulent representations made by the defendant, occupying an official post in the service of the Emperor of China, to the principal of the Foreign Board at Pekin, respecting the conduct of the plaintiff as a professor in the college established there, which led to his dismissal by that Board. In ordering a new trial on the ground of misdirection, it was said that if it were shewn, that by the law and customs of China officers in the service of the government were absolutely protected in making reports concerning their subordinates, and that it was against the policy of that

(*a*) L. R. 6 Q. B. 1; S.C. L. R. 4 Q. B. 225; see *The Halley*, L. R. 2 P. C. 193, referred to by Willes, J., in his judgment cited above.

(*b*) Cwyp. 161; 1 Sm. L. C. 658.

(*c*) L. R. 4 P. C. 439, 463.

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Criminal
offence by
lex loci, but
not actionable,
how far
actionable
elsewhere.

Empire to allow them to be questioned by any Court, it might be proper to hold that it would be contrary to the comity of nations, and therefore contrary to public policy in the eyes of an English Court, to allow a British subject who had voluntarily entered into the service of the Chinese Government, to maintain any action for the representations in question.

These authorities seem, therefore, to shew conclusively that if an alleged wrong is not actionable in the country where it is committed, no damage can be recovered for it in England; but a doubt has been raised as to the effect of the foreign law in those cases where the act is one for which criminal proceedings might have been taken in the Courts of the country where it was committed, though no damages could have been there recovered. Wightman, J., intimated an opinion that if a trespass was not lawful or justifiable by the law of the country where it was committed, the mere fact that no remedy by recovery of damages was given by that law would not deprive the person aggrieved of his right to damages given by the English law, at any rate when the parties were British subjects (*a*). No opinion on this point was, however, necessary for the decision of the case, as the pleadings were held not to contain any averment that damages might not be recovered by the foreign law for the alleged trespasses, and the rest of the Court guarded themselves from being supposed to assent to the *dictum* referred to. The later decisions which have been cited appear virtually to overrule it. The law of the place where an act is done defines its character altogether, and pronounces once for all whether it is wrongful and actionable, or legal and innocent. It may of course stamp it as wrongful but not actionable, as in *Scott v. Seymour*. In that case the act is not a wrong to the individual, but only to the State. Consequently, the individual who considers himself aggrieved cannot claim damages for that which is no wrong to him, either in the country where the act is

(*a*) *Scott v. Seymour*, 1 H. & C. 219.

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committed or in any other. To say that such a foreign law gives the person injured a criminal remedy but not a civil one, and that the question is therefore one of procedure for the *lex fori*, is a mistake. The individual is given no remedy at all, since a criminal prosecution is not for the benefit of the individual, but of the State. He is given no remedy by the law of the place where the act is done, because that law regards him as having suffered no wrong, and the law of any tribunal in which he may afterwards sue should accept the decision of that which has natural and primary jurisdiction. In the words of Willes, J., the obligation is the principal to which the right of action in any Court whatever is only accessory, and such accessory, according to the maxim of law, follows the principal, and must stand or fall therewith. *Res, quæ accessorium locum obtinent, extinguuntur cum res principales peremptæ sunt.* A right of action, whether it arise from contract governed by the law of the place, or from a wrong, is equally the creature of the law of the place, and subordinate thereto. The terms of the contract or the character of the subject-matter may shew that the parties intended their bargain to be governed by some other law; but *prima facie* it falls under the law of the place where it was made. And in like manner the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law. Therefore, an act committed abroad, if valid and unquestionable by the law of the place, cannot, so far as civil liability is concerned, be drawn in question elsewhere, unless by force of some distinct exceptional legislation, superadding a liability other than and beside that incident to the act itself (*a*). It cannot, however, be said that these *dicta* are necessarily to be understood as giving a sufficient answer to the opinion expressed by Wightman, J., in *Scott v. Seymour* (*b*), with respect to the case of an act illegal and criminal, but not *actionable*, by the

(*a*) *Per Willes, J., in Phillips v. Eyre, L. R. 6 Q. B. 1, 28.*

(*b*) 1 H. & C. 219.

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no municipal
jurisdiction.

law of the place where it was committed ; and the law on this branch of the subject can scarcely be regarded as free from doubt.

When the act complained of takes place in a locality over which no municipal law extends, so as to be competent to decide its wrongful or innocent nature, it would seem (a) that the *lex fori* must necessarily be followed, in the absence of any other with authority to speak. Thus, in an action by a submarine telegraph company against the foreign owners of a ship, for negligence and want of proper care in navigating their ship, whereby the cable of the plaintiffs, stretching from Dover to Calais, was damaged by the defendants' anchor, it was apparently assumed that the law of England was the proper measure of the negligence complained of, and of its actionable character, whether the injury was done to the 'cable within or without the limit of three miles from the English shore (b). It could not, of course, be contended that the English Court had not jurisdiction to try an action for personal damages, whatever the locality of the *factum*, on the principles already explained ; and it did not appear that any law could be invoked to measure a tort committed on the high seas, or (in this case) on the soil at the bottom of the high seas, but the law of the *forum* in which the action was brought. Torts in the nature of collisions between vessels on the high seas are within the original jurisdiction of the High Court of Admiralty, whatever the nationality of the parties, though it may be that the Court has a discretion whether or not it will interfere between litigants who are both the domiciled subjects of a foreign State (c) ; and by modern statutes,

(a) Story suggests (§ 423) that with respect to such torts as these, each nation would either apply its own law (i.e., the *lex fori*), or would apply the same law that the nation to which the tortfeasor belonged would apply if the circumstances were reversed, following the rule of reciprocity. See *The Girolamo*, 3 Hagg. Ad. 169.

(b) *The Submarine Telegraph Co. v. Dickson*, 15 C. B. N.S. 759. As to the three-mile zone, see *R. v. Keyn*, L. R. 2 Ex. D. 63, and *The Territorial Waters Jurisdiction Act*, 1878. In the case cited in the text, it was alleged that the cable was lying in the high seas within the three-mile zone by virtue of a charter from the Crown.

(c) *Per* Sir R. Phillimore in *The Mali Ivo*, L. R. 2 A. & E. 356.

the same Court has been given jurisdiction over any claim for damage done by any vessel, whether to another vessel or to person or property in some other form (a). These latter torts also were originally within the jurisdiction of the Admiralty Court, according to Sir R. Phillimore in *The Sylph* (b), in which case the statutory jurisdiction just referred to was held to include the case of damage inflicted by a steamer on the River Mersey upon a diver during his employment at the bottom. The same jurisdiction had been already applied to a cause of damage against a ship for injury to a breakwater (c). It is perhaps superfluous to repeat that in such a case if the breakwater injured were an integral part of the soil of a foreign State, the question of jurisdiction will arise in a more serious form (d).

(iii.) *Measure of the remedy.*—The general rule will be stated in its proper place (e), that all questions of remedy or procedure belong to the *lex fori*; and the theory of the remedy available in case of tort is of course no exception to the general rule. “As to foreign laws,” says Willes, J., Remedies governed by *lex fori*. “which affect the liability of parties in respect of bygone transactions, the law is clear that if the foreign law touches only the remedy or procedure for enforcing the obligation, as in the case of an ordinary statute of limitations, such law is no bar to an action in this country; but if the foreign law extinguishes the right, it is a bar in this country equally as if the extinguishment had been by a release of the party, or an act of our own legislature” (f). The question, in fact, is always whether the foreign law goes to the nature of the right, the essence of the obligation, or whether it only affects the manner in which the right is to be enforced, or the obligation dissolved. If the latter is its true construction, it has no operation except in its own tribunals; if the former, its decision

(a) 24 Vict. c. 10, s. 7; 3 & 4 Vict. c. 65.

(b) L. R. 2 A. & E. 24. The law on this branch of the subject is exhaustively collected by Story in *De Lovio v. Boit*, 2 Gallison, 398.

(c) *The Uhla*, cited in note, L. R. 2 A. & E. 29.

(d) *The M. Motham*, L. R. 1 P. D. 107.

(f) In *Phillips v. Eyre*, L. R. 6 Q. B. 29.

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(e) *Infrà*, Chap. X.

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Lex fori
cannot create
liability.

must be respected by all Courts alike. In the words of Willes, J., which have been already cited, "the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law. Therefore, an act committed abroad, if valid and unquestionable by the law of the place, cannot, so far as civil liability is concerned, be drawn in question elsewhere, unless by force of some distinct exceptional legislation, superadding a liability other than and beside that incident to the act itself" (a). But if the law of the place make the act in question an actionable wrong, it is actionable in English Courts according to the English law and method of procedure. It can scarcely be said that the distinction between civil and criminal proceedings is one of remedy or procedure. An act which the law of the place forbids, and imposes a penalty on, is not necessarily an act for which the same law would give the aggrieved person an action for damages; and therefore, though it may be a wrong by the law of the place where it was done, it may not be an actionable wrong. The question whether, under such circumstances, it would be an actionable wrong in an English Court, arose in *Scott v. Seymour* (b); but it was ultimately held to be unnecessary to decide it, inasmuch as the plea in dispute was construed not to amount to an averment that the wrong was not actionable at all in the Civil Courts of the country where it was committed. Wightman, J., expressed an opinion that, at any rate between British subjects, the fact that the local law gave no civil remedy for a wrong, which it nevertheless made criminal, would not prevent an action for damages from being maintained in England. "I find no authority for holding, even if the Neapolitan law gives no remedy for an assault and battery, however violent and unprovoked, by recovery of damages, that therefore a British subject is deprived of his right to damages given by the English law against another British subject" (c).

(a) *Phillips v. Eyre*, L. R. 6 Q. B. 28.

(c) 1 H. & C. p. 235.

(b) 1 H. & C. 219.

The other judges, however, carefully guarded themselves against being supposed to concur in this view, and the distinction between British subjects and foreigners, at any rate, seems arbitrary and unfounded (*a*). The reasonable construction of the recent authorities seems to point to an opposite conclusion, and it will probably be safer to say that the tortious or illegal nature of an act is to be decided once for all by the law of the place where it was committed. The remedy alone is a matter for the *lex fori* to regulate; *i.e.*, assuming that an act is a tort, and therefore an actionable wrong, the *lex fori* must prescribe the mode in which the action is to be brought. There is at any rate no direct authority for allowing the *lex fori* any further effect, or permitting it to say, in any case, that an action shall be maintained which could not have been brought at all in the Courts of the place where the act was done. Nor ought the *lex fori* to be allowed to determine the person on whom the liability to an action attaches, by whatever other law that may eventually be decided. In the *General Steam Navigation Company v. Guillou* (*b*), the action was brought against the defendant as alleged owner of a certain vessel, for so negligently navigating her by his servants on the high seas as to come into collision with and sink a ship of the plaintiffs; and the defendant pleaded that the vessel was the property of a society or company established by French law, of which he was a shareholder and the acting director, and that by French law he the defendant was not responsible for or liable to be sued or impleaded individually, or in his own name or person, in respect of the causes of action in the declaration mentioned, but the said company alone, by their said style or title, or the master or person in command of the ship for the time being, was responsible for and liable to be sued and impleaded for the said causes of action. The Court of Exchequer were divided as to the true construction to be put on this plea, but they were agreed in expressing a strong opinion that if the plea was

(*a*) *Per* Blackburn, J., *ib.* 237.

(*b*) 11 M. & W. 877.

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to be taken as averring that, by the law of France, the defendant was not liable for the acts of the master of the vessel, but that a body established by French law, and analogous to an English corporation, were the proprietors of the vessel, and alone liable for the acts of the master, who was their servant and not the servant of the individuals composing that body, then there was a good defence to the action. On the other hand, it was said that if the plea merely meant that the proper course of proceeding in a French Court would be to sue the defendant jointly with the other shareholders of the company under the name of their association, it would undoubtedly be bad; for it was well established, "that the forms of remedies and modes of proceeding were regulated solely by the law of the place where the action was instituted—the *lex fori*; and it was no objection to a suit instituted in proper form in England, that it would have been instituted in a different form in the Court of the country where the cause of action arose, or to which the defendant belonged" (a). It appears quite clear, if the former of the two suggested constructions is adopted, that the *lex fori* could have had no title to interfere. The rule of maritime law adopted in England is no doubt that the owner is liable for the negligent navigation of the master, but the vessel in question was sailing under the flag of France, and owned wholly in that country. The question, therefore, involved in the plea, adopting the construction indicated, was simply of the ownership according to the law of France. If the defendant was not owner, the master was not his servant; but the servant of the French corporation, who alone were liable for his acts; and the law of the ship's flag was obviously the only one competent to determine the question.

Measure of
damages.

The *lex loci actus* is clearly the proper law to measure the amount of damages properly flowing from a tortious act. Thus it was decided in an old case that where there had been a tortious conversion of a ship abroad, interest

(a) 11 M. & W. p. 895.

was to be calculated, in assessing the damages, on the value of the ship at the rate of interest fixed by the foreign law (*a*). The calculation of interest, on a breach of contract, is almost invariably determined, on a similar principle, by the law of the place where payment ought to have been made; the theory being that the plaintiff has a right to be put in the same position, as to all questions of interest and currency, as if payment had been made at the place and time stipulated for (*b*). Thus where the action is against the acceptor of a bill, the law of the place where he agrees to pay prevails; and on the same principle it was held that where the claim was in fact against the drawers, who had drawn the bill in Canada, the Canadian law determined the interest (*c*).

In pronouncing upon torts committed upon the high seas, the Court of Admiralty must of course be guided by maritime law without reference to the municipal law of either of the litigant parties; except where English statutes have laid down different principles for its guidance. The maritime law as administered in English Courts is in fact, according to the latest expressions of judicial opinion, English law (*d*); and in applying it to actions founded upon torts committed on the high seas, the law of the *forum* is, in a sense, adopted in the place of any with a better claim to be regarded as the *lex loci*.

The true conception of this law is, more probably, that Maritime law. law which the English Court considers to be regarded by all maritime civilized nations—and itself—as the *lex loci*—the law operating upon the high seas, and bearing the same relation to that part of the surface of the earth that the municipal law of any independent State bears to the territory of that state. It is undoubtedly founded upon and has originated in the principles of law which have been adopted as common by the majority of maritime

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(*a*) *Ekins v. East India Co.*, 1 P. Wms. 395.

(*b*) *Suse v. Pomp*, 8 C. B. N.S. 538; *Cash v. Kennon*, 11 Ves. 314; *Scott v. Bevan*, 2 B. & Ad. 78; *Cockerell v. Barber*, 16 Ves. 461.

(*c*) *State Fire Insurance Co., In re*, 32 L. J. Ch. 300.

(*d*) See *per Willes, J.*, in *Lloyd v. Guibert*, L. R. Q. B. 125; *The Hamburg*, 2 Moo. P. C. N.S. 289; *ante*, p. 368.

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nations, and is therefore, in one sense, international. In another sense it is municipal; that is, it is the law which the English Court of Admiralty applies to certain transactions happening out of British dominions, to which the ordinary statute law of the realm does not, in the absence of an expressed intention to that effect, apply. It is laid down by Blackstone (*a*), that "affairs of commerce are regulated by a law of their own, called the law merchant, or *lex mercatoria*, which all nations agree in and take notice of." With respect to the liability of the owners of a vessel for damage done by her by collision on the high seas, it is clear that by this law, apart from the effect of English statutes, the liability went to the full extent of the tort, nor was any limit imposed on the duty of making compensation (*b*); and this is, of course, also the rule of the English common law. By the statute 53 Geo. III. c. 159, s. 1, it was however enacted that shipowners should not be liable for any damage occasioned by the ship beyond the value of the ship and freight (*c*). The Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), s. 64, adopted this principle by limiting the liability of the owners to an aggregate amount calculated in proportion to the ship's tonnage, and extended it in terms to the owners of foreign as well as British ships. Under the previous statute it had been held that the limitation of liability applied only where both litigants were British, and that the English law could neither be invoked for or against either plaintiff or defendant in the English Court where a foreign ship was concerned (*d*). It must therefore be taken as having been decided that this municipal law limiting the liability of shipowners was not and is not a law regulating the remedy merely, with which the *lex fori* has alone to do. "Clearly," said Vice-Chancellor Page Wood in *Cope v. Doherty*, "an act which limits the

(*a*) 1 Bl. Com. c. 7, 273; 4 Bl. Com. c. 5, p. 67.

(*b*) *Per* Sir J. Nicholl in *The Girolamo*, 3 Hagg. Adm. 186; see also *The Carl Johann*, cited 1 Hagg. Adm. 109.

(*c*) Re-enacted by 17 & 18 Vict. c. 104, s. 504.

(*d*) *Cope v. Doherty*, 4 K. & J. 367; *The Wild Ranger*, 1 Lush. 553.

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damages to which the shipowner is to be liable under circumstances like the present deals with the substance and not the form of the procedure. It in effect forms a contract that, whereas by the natural law the owner of the ship or property that has been injured would be entitled to damages to the full extent of the loss that he has sustained, all those persons upon whom the legislature can impose such a contract, that is to say, all its own subjects, shall forego that which the natural law—the common law, as we should call it in England—would give them, and shall be entitled only to the amount of the value of the ship by which the injury has been inflicted, and of the freight due or to grow due in respect of such ship during the voyage" (a). It had been contended in argument in this case that whether such a limitation of liability was a matter of remedy and procedure for the *lex fori* or not, the English rule could not be applied because the proper construction of the statute (17 & 18 Vict. c. 104, s. 504) was that it did not intend to limit the liability of foreigners. So far, however, as the liability of a foreign shipowner is concerned, it is now unnecessary to discuss the former point, or to attempt any criticism of the "contract" which the statute was said by Lord Hatherley to impose upon British subjects, inasmuch as the later statutory provisions (b) expressly include the owners of foreign as well as British ships.

(a) *Cope v. Doherty*, 4 K. & J. 367, 384.

(b) Sect. 54 of the Merchant Shipping Acts Amendment Act, 1862 (25 & 26 Vict. c. 63), commences as follows: "The owners of any ship, whether British or foreign, shall not, in cases where all or any of the following events occur without their actual fault or privity, that is to say,

"(3) Where any loss of life or personal injury is by reason of the improper navigation of such ship as aforesaid caused to any person carried in any other ship or boat;

"(4) Where any loss or damage is by reason of the improper navigation of such ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat;

"Be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ship's boats, goods, merchandise, or other things, to an aggregate amount exceeding £15 for each ton of their ship's tonnage; nor in respect of loss or damage to ship's goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding £8 for each ton of the ship's tonnage."

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Torts on high
seas—limita-
tion of
liability for.

The state of the law then, when this enactment was passed, was as follows: No limitation of liability for torts was imposed upon ship-owners by the general law maritime, and the English statutes which did impose such a limitation had been held only to apply to cases where both the plaintiff and defendant were British subjects; i.e., in the case of a collision, where both the ships sailed under the British flag; on the ground that the full liability of foreign ship-owners was not cut down by the English Merchant Shipping Acts, and that these Acts were not to be construed as depriving such foreign ship-owners of their full natural rights against British or other ship-owners without express words to that effect (a). Then came the statute (25 & 26 Vict. c. 63, s. 104) which in terms limited the liability of foreign ship-owners. The previous cases having been decided on the ground, amongst others, that the English statutes were not to be construed as limiting the *rights* of foreign ship-owners against British subjects, because they had not limited their *liability* when the position was reversed; the question arose whether, now that the *liability* of foreign owners was limited in express terms, the *rights* of foreign owners—i.e., the liabilities of British owners when sued by foreigners—were not to be limited in the same way. It was held in *The Amalia* (b), by the Privy Council, confirming the judgment of Dr. Lushington, that they were to be so limited, the statute having now enabled an English Court to do reciprocal justice when it was sought to impose unlimited liability on a foreign ship. “If the statute in question,” says Dr. Lushington, “gives the right of limited liability to the British ship-owner and the foreign ship-owner alike, if there be perfect reciprocity, then complete justice is done, and I have no longer to struggle against an interpretation producing injustice. In construing this section, therefore, I must look to see whether it purports to affect the owners

(a) *Cope v. Doherty*, 2 K. & J. 367; *The Wild Ranger*, 1 Lush. 553; 32 L. J. Adm. 49.

(b) 1 Moo. P. C. N.S. 471.

of British ships and the owners of foreign ships; and if I find, from the words of the section and from the whole context and subject-matter, that it was the intention of the statute to make limited liability for both British and foreign ships, then I consider there is no serious objection to the British Parliament legislating for foreigners" (a).

The last clause from the above quotation from Dr. Lushington's judgment indicates the real nature of the controversy. It had been decided in the previous cases that a law which limited the liability of a tortfeasor was not a law relating to procedure (though it did undoubtedly directly affect the *remedy* available), and that it was not therefore applicable, in the character of the *lex fori*, to foreigners. It was, however, indisputable that it was competent to the English legislature to direct its Courts to apply it to any or all of the causes that came before them, and thus to legislate for foreigners, so far as they were litigants before English tribunals. The only question was, how far the English legislature had done so; and it had been held that the previous enactment (17 & 18 Vict. c. 104, s. 504) had in fact legislated for foreigners as well as British subjects in respect of collisions that took place within a distance of three miles from the British shores (b)—the limit to which the jurisdiction of an independent State claims by the law of nations to extend (c). The construction put by the Privy Council in the case of *The Amalia* (d) upon the last statute (25 & 26 Vict. c. 63), is in effect that the English legislature has now legislated for foreigners who are concerned in collisions on any part of the high seas, whenever the rights or liabilities of those foreigners come in question in an English Court, so far as to limit their right to recover and their liability to pay damages by one and the same rule.

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(a) 1 Moo. P. C. N.S. p. 475.

(b) *General Iron Screw Colliery Co. v. Schurmans*, 1 J. & H. 180; 29 L. J. Ch. 877; but see this case questioned in *The Saxonias*, 1 Lush. 412, 419, 421.

(c) See *R. v. Keyn*, L. R. 2 Ex. D. 63; The Territorial Waters Jurisdiction Act, 1878.

(d) 1 Moo. P. C. N.S. 471.

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**Merchant
Shipping Acts
—rules of
navigation.**

It may here be added that the section (s. 503) in the Merchant Shipping Act, 1854, which immediately preceded the provision limiting the liability of ship-owners in case of collision, and conferred an absolute protection on ship-owners in the case of damage done to cargo by fire, or of loss of precious metals and stones by theft, where the nature and value of such articles had not been inserted in the bill of lading, was uniformly construed as applying only to British ships (*a*) ; and has not been extended, like s. 504, to foreign ship-owners by any later enactment.

The provisions of the Merchant Shipping Acts which have just been considered relate strictly to the measure of the remedy, though, as has been already pointed out, it has been decided that they are not regulations of remedy or procedure in such a sense as to be applicable to foreigners simply in the character of the *lex fori*. Certain other cases, however, which were decided on the applicability to foreigners of the English statutory regulations concerning sailing and navigation, have in reality nothing to do with the remedy at all, though they are generally cited in connection with the questions considered above. Those regulations are, in fact, municipal laws intended to follow British subjects over any part of the high seas, and to govern their conduct *inter se*, so as to determine the tortious or innocent nature of the navigation of a British ship which results in collision. Accordingly, it seems to have been rightly decided that they are inapplicable whenever either of the parties to the collision was foreign (*b*) ; and this although s. 298 of the Merchant Shipping Act, 1854, provides that if it appears to the Court that the collision was occasioned by the breach of any of the statutory rules, the owner of the ship by which such a rule has been infringed shall not be entitled to recover any recom-

(*a*) Maclachlan on Shipping, p. 113 : *The General Screw Colliery Co. v. Schurmans*, 1 J. & H. 180 ; *Cope v. Doherty*, 4 K. & J. 367 ; *The Girolamo*, 3 Hagg. Adm. 187 ; *The Carl Johann*, cited 1 Hagg. Adm. 113.

(*b*) *The Dumfries*, Swab. 63 ; *The Zollverein*, Swab. 96 ; *The Saxonie*, 1 Lush. 412 ; 17 & 18 Vict. c. 104, ss. 295-298.

pense whatever for any damage sustained by such ship in such collision, unless it is shewn to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary. In *The Zollverein* it was alleged that the British vessel, which had been in collision with a Prussian brig, had violated s. 296 of the Merchant Shipping Act, 1854, which imposed upon her a statutory duty of porting her helm in circumstances under which the general maritime law would not require it. It was held that the owners of the Prussian ship could not set up against the English vessel this breach of an English statute. Dr. Lushington, after quoting Story's *dictum* (a) that with regard to the rights and merits involved in actions, the law of the place where they originated was to be followed, but the forms of remedies and the order of judicial proceedings were to be according to the *lex fori*, proceeded as follows: "Now does s. 296 relate to the merits and rights of the case, or to the remedy and order of judicial proceeding? . . . I am of opinion that in its true meaning, s. 296 is wholly applicable to the merits of the case; it determines how vessels shall conduct themselves at the time of collision on the high seas; the legislature of this country has no power to bind foreign vessels in such a condition. It is true that s. 298 relates to remedy, but the application of the section is entirely founded on and emanates from s. 296. Then comes the question, whether, in a trial of the merits of a collision, a foreigner may urge in his defence that the British vessel, though free by the law maritime, has violated her own municipal law, and so, being plaintiff, cannot recover? Reverse the position: suppose the foreigner plaintiff, and to have done his duty by the law maritime. I am clear that he must recover for the damage done; if so, it is contrary to equity to say that the British ship-owner, *in eadem conditione*, shall not recover against the foreigner. What right can the foreigner have to put forward British statute law, to which he is not amenable so far as the merits are concerned?" In

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(a) Story, Conflict of Laws, § 558.

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The Saxonia (a) the collision in question took place in the Solent, within three miles of the British shore, and it was nevertheless held that the statute was inapplicable to foreign vessels even in those territorial waters, though little attention was paid in the judgment to the contention that the law of nations gave jurisdiction to every State within three miles from its coasts. It appears more than doubtful whether these provisions of the Merchant Shipping Act are applicable to foreign vessels on the Thames or other English tidal river, though a custom of navigation which has grown up there in consequence of the statute is no doubt binding upon them (b).

SUMMARY.

TORTS.

p. 389.

(i.) *Jurisdiction as to Torts.*—An English Court has jurisdiction to try actions based on torts to the person, or to movable personal property, wherever those torts were committed.

p. 390.

Torts to immovable property situate abroad were formerly excluded from English Courts by the technical rules of venue.

Whether they were also excluded by any principle of international law, and whether, therefore, an English Court is still without jurisdiction to try actions based on such torts, has not been decided, and appears very doubtful.

p. 393.

(ii.) *Measure of the wrong done.*—When an action is brought in an English Court on a tort committed abroad, the act complained of must be wrongful both by English law and by the law of the country where it was committed.

(Query, whether it must not only be wrongful, but also actionable, by the latter law?)

p. 394.

Legislation in the country where the act was committed,

(a) 1 Lush. 412. The case of *The General Iron Screw Colliery Co. v. Schurmans*, 1 J. & H. 180, must be regarded as questioned, if not overruled by this decision.

(b) *The Fyenoord*, Swab. 377; and see *The Milford*, ib. 367; *The Annapolis*, 1 Lush. 295, and cases cited in MacLachlan on Shipping, p. 268, n. 4.

purgings the tort, though *ex post facto* and retrospective in its operation, will be a good answer to an action in an English Court.

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If the place where the act complained of was committed p. 398. is not under the domain of any special municipal law, the *lex fori* will be applied to test the tortious nature of the act.

The *lex fori* in English Courts, with respect to wrongful collision on the high seas, is the general law maritime as administered in England.

But where both the parties to the collision are British p. 408. subjects, the general law maritime is modified by the Merchant Shipping Acts.

(iii.) *Measure of the remedy.*—The remedy in general p. 399. depends, like other questions of procedure, upon the *lex fori*, the question whether the act is one which is entitled to a remedy at all being decided by the law of the place where it was committed.

(Query, how far an act criminal but not actionable by the law of the place where it was committed is actionable in England?)

The provisions of the English Merchant Shipping Act p. 404. which limit the liability of the ship-owners for damage done by the ship are not rules of remedy or procedure which apply universally in the right of the *lex fori*, but are applicable by express enactment to foreign ships, when their rights and liabilities with respect to collision on the high seas come in question in an English Court.

The provisions of the English Merchant Shipping Acts p. 408. which direct that redress shall not be given in cases of collision, where the rules of the same Acts as to navigation have not been complied with, are not rules of remedy or procedure, but tend to determine the tortious nature of the acts resulting in collision. They are not therefore applicable to collisions on the high seas, except between British vessels, or even to such collisions in British territorial waters.

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PROCEDURE.****CAP. X.****Part IV.—PROCEDURE.****CHAPTER X.****PROCEDURE GENERALLY, AND EVIDENCE.**

No principle of private international law is more certain in itself, than the rule that the forms of remedies and modes of proceeding are regulated solely by the law of the place where the action is brought (*a*). The only difficulty in the application of the general rule is to decide where formalities end and essentials begin. A law which will allow a remedy to be obtained only in a particular manner, or which imposes an impossible formal condition upon the only mode of procedure applicable to the case, does in effect, though indirectly, govern the right of action itself. A striking illustration of this is seen in the application of the Statute of Frauds to all contracts sued on in an English Court. It is a general principle that all questions relating to the admissibility and effect of evidence depend upon the *lex fori*, as matters of procedure (*b*) ; and the Statute of Frauds, which requires that certain contracts shall be evidenced by writing to support an action upon them, has been held to come within this rule (*c*). The result is, of course, to render a contract which may have been perfectly good according to the law of the place where it was made or was to be performed, practically invalid in an English Court. The vexed question of the

(*a*) *Don v. Lippman*, 5 Cl. & F. 1, 13; *British Linen Co. v. Drummond*, 10 B. & C. 903; *De la Vega v. Vianna*, 1 B. & Ad. 284; *Huber v. Steiner*, 2 Scott, 304; *Ferguson v. Fyffe*, 8 Cl. & F. 121; *General Steam Navigation Co. v. Guillou*, 11 M. & W. 277.

(*b*) *Bain v. Whitehaven, &c., Ry. Co.*, 3 H. L. C. 1.

(*c*) *Leroux v. Brown*, 12 C. B. 801; *Acebal v. Levy*, 10 Bing. 376; *ante*, p. 277.

applicability of the English Statute of Limitations to an action brought on a foreign contract, affords another example of the difficulty referred to. The right of action, so far as an English Court is concerned, is practically extinguished by an enactment which after a certain time prevents its enforcement; but this incidental effect of a law which professes merely to prescribe the terms and mode of the remedy does not prevent the *lex fori* from exerting its full operation.

The shortest way of stating the general rule is, that the Remedies remedy is to be enforced according to the *lex fori* (a). It governed by is perhaps scarcely correct to say that the parties must be taken to have contemplated the possibility of enforcing the obligation existing between them in any country, a fiction which would obviously be altogether incapable of application to actions based on torts; but it is at any rate clear that the parties who have recourse to a tribunal to enforce any obligation, whether arising from tort or contract, must take the law which regulates the remedy they are seeking as they find it. The subject of procedure, understanding by procedure the process by which a remedy is to be obtained, includes the determination of the following elements: (i.) the name in which and against which the action is to be brought; (ii.) the time within which it must be brought; (iii.) mode of suing and enforcing process; (iv.) the evidence admissible and necessary to support an action; (v.) the recognition and enforcement of foreign judgments. It will be convenient to consider how far the *lex fori* is supreme with respect to each of these subdivisions.

(i.) *Parties to the Action.*—(a.) *Name in which it must be brought.*—It is said by Story, that it has been held that the inquiry, in whose name the action is to be brought, belongs not so much to the right and merit of the claim, as to the form of the remedy (b). So far as it belongs to the form of the remedy alone, and does not alter the

(a) *Per Lord Brougham in Don v. Lippman*, 5 Cl. & F. 1, 13.

(b) Story, Conflict of Laws, § 565.

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ultimate direction in which the benefit of the remedy is to flow, the *lex fori* has been held entitled to control it. Thus, before the adoption by the Judicature Acts of the equitable rule as to the assignment of a *chase in action*, it was held that the assignee of a *chase in action* could not sue in England on it in his own name, although the assignment might have been made in a country where its validity was recognised by the law (a). The point did not exactly arise in *Trimbey v. Vignier* (b), and the cognate cases, in which the question has been as to the law which was to govern the sufficiency of the assignment, the assignee, if the assignment was valid by the proper law, being admittedly entitled to sue in his own name by the *lex fori* and the *lex contractus* alike. There are nevertheless expressions in the judgment in *Trimbey v. Vignier* which throw some doubt on the theory that the name in which the action is to be brought is a matter for the *lex fori* to determine at all. There is no doubt considerable difficulty in distinguishing the name in which the action is to be brought from the title on which it depends (c); the latter belonging to the province, not of the *lex fori*, but of the law which created it. Thus it has been pointed out with regard to bills of exchange and promissory notes, that their assignability, upon which the right of the holder to sue in his own name depends, must be measured by the law which governs the nature and extent of the obligation of the contract (d), and every promise or undertaking must be regarded as having the same inherent force. Consequently, if a *chase in action* is in its inception assignable, and has been rightly assigned, the assignee's title will be acknowledged as complete without reference to the *lex fori* in all courts (e). It has been similarly shewn that

(a) *Wolff v. Oxholme*, 6 M. & S. 92, 99; *Jeffery v. M'Taggart*, ib. 126; *Innes v. Dunlop*, 8 T. R. 595; *Folliott v. Ogden*, 1 H. Bl. 135.

(b) 1 Bing. N. C. 151; *Bradlaugh v. De Rin*, L. R. 5 C. P. 473; *Lebel v. Tucker*, L. R. 3 Q. B. 77; *ante*, p. 355.

(c) *Westlake*, § 409.

(d) *Ante*, pp. 355, 360.

(e) *Bradlaugh v. De Rin*, L. R. 5 C. P. 473; *Lebel v. Tucker*, L. R. 3 Q. B. 77; *Trimbey v. Vignier*, 1 Bing. N. C. 151; *O'Callaghan v. Thomond*, 3 Taunt. 81; *Innes v. Dunlop*, 8 T. R. 595; *De la Chaumette v. Bank of England*, 2 B. & Ad. 385.

the title conferred on the assignees by a foreign bankruptcy assignment is accorded a like recognition in an English Court (*a*). And where two out of three syndics of a French bankrupt sued in England on a *chose in action* of the bankrupt without joining the third, it was held that they were justified in doing so by proof that the French law would have allowed the same to be done. "The property in the effects of the bankrupt," said Parke, B., "does not appear to be absolutely transferred to these syndics in the way that those of a bankrupt are in this country; but that the syndics act as mandatories or agents for the creditors, the whole three, or any two or one of them having the power to sue for and recover the debts in their own names. This is a peculiar right of action created by the law of that country, and we think it may be by the comity of nations enforced in this, as much as the right of foreign assignees or curators, or foreign corporations, appointed or created in a different way from that which the law of this country requires" (*b*). There can be no doubt that this is a strong authority against regarding the determination of the name in which an action is to be brought as one of procedure at all, and that it is difficult in the face of such a decision to distinguish any such question from the general one of title, on which the *lex fori* has no title to make itself heard.

The title of an administrator or executor under a foreign grant to enforce the *choses in action* of the deceased in England is not recognised, as has been already said (*c*), until administration is taken out here. This is, however, for a different reason. A foreign administration is not regarded as transferring or assigning any movable property except those actually situate within the jurisdiction of the law which grants it, and a foreign administrator who has not obtained an English grant has consequently no title at all to the *choses in action* of the deceased here. An assignment *inter vivos*, on the contrary, is intended to

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assignees.

- (*a*) *Ante*, pp. 234, 415.
- (*b*) *Alivon v. Furnival*, 1 C. M. & R. 277, 296; 4 Tyrwhitt, 751.
- (*c*) *Ante*, p. 198.

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woman.**

operate all the world over, and claims universal recognition on that footing ; while an assignment by law or bankruptcy is acknowledged by international comity, as has been already pointed out, as having a similar effect. The right of a husband to sue in his wife's name with respect to the movables acquired by him through her is referred, upon the same principle, to the law of the matrimonial domicil ; to which the intention of the parties must also be presumed to have been directed (a). So when a husband and wife are domiciled in a country where the wife has no equity to a settlement, an English Court will order payment of the wife's legacy to an assignee of the husband (b)—a case not strictly pertinent to the present subject, but which shews the inability of the *lex fori* to interfere with any question of title in a strong light. So it appears that a *feme covert*, who carries on business in a country where the law permits her to do so as a sole trader, may sue here in respect of transactions entered into in that character ; but that husband and wife cannot sue here as partners in trade, though that trade was carried on under a law which recognised such partnership (c). The distinction is perhaps a shadowy one, but seems to be founded on the view that the right of a *feme covert* to acquire property and sue for it in any court must be decided by the law under which she lives, but that her right to sue jointly with her husband as his partner, involves a question of the misjoinder of parties, which is properly a matter of procedure for the *lex fori*. It may be remarked, with reference to this case, that the custom of the city of London which allows a *feme covert* to carry on business as a sole trader in the city, does not authorize her to sue as such trader in any but the City of London Courts (d) ; so that it does not really purport to give her a title for general purposes at all.

(a) *Dues v. Smith*, Jacob, 544; *Sawyer v. Shute*, 1 Anst. 63; *Campbell v. French*, 3 Ves. 321.

(b) *McCormick v. Garnett*, 5 De G. M. & G. 278.

(c) *Cosio v. De Bernales*, 1 C. & P. 266; Ry. & Moo. 102.

(d) *Beard v. Webb*, 2 B. & P. 98; 1 C. & P. 267, n.

(b.) *Name against which the action is to be brought.*—It is quite clear that no person can be made liable by the *lex fori*, as an incident of procedure, who would not have been exposed to liability by the proper law to govern the act or contract in respect of which he is sued, and his connection with it. Thus in the *General Steam Navigation Company v. Guillou* (a), the defendant, who was sued for injury done to the plaintiff's ship on the high seas by a vessel of which he was alleged to be the owner, pleaded that the real owners of the vessel which caused the collision were a French society or company, of which he was a shareholder and acting director, and that by the law of France, the defendant was not responsible for or liable to be sued or impleaded individually, or in his own name or person, in respect of the causes of action alleged, but that the said company alone, by their said style or title, were responsible for and liable to be sued and impleaded for the said causes of action. It is not easy to see how this plea could have been construed as anything but a denial that the defendant was personally or individually liable at all by French law, although the Court of Exchequer were equally divided on this question; but the true principle by which such cases are to be determined is no doubt correctly indicated in the judgment. “If the defendant,” said Parke, B., “was not liable for the acts of the master by that law which is to govern the case, he has a good defence to the action. For the defendant, it is contended that the plea means to aver that by the law of France, he was not liable for those acts, but that a body established by the French law, and analogous to an English corporation, were the proprietors of the vessel, and alone liable for the acts of the master. . . . If such be the true construction of the plea, we are all strongly inclined to think that there is a good defence to the action. On the other hand, the plaintiff contends, that the plea only means that in the French Court the mode of proceeding would be to sue the defendant jointly with the other shareholders of

(a) 11 M. & W. 877.

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the company under the name of their association : and if this be the true construction of the plea, we all concur in the opinion that the plea is bad ; for it is well established that the forms of remedies and modes of proceeding are regulated solely by the law of the place where the action is instituted—the *lex fori* ; and it is no objection to a suit instituted in proper form here, that it would have been instituted in a different form in the court of the country where the cause of action arose, or to which the defendant belongs" (a). The distinction intended appears to be, that the defendant, if not personally liable at all by the French law, could not be made so by the *lex fori*; but that if in France he was under a joint personal liability with the other members of the association, the fact that they were not joined as defendants would be immaterial, as relating to a question of procedure; and this was the principle afterwards adopted in *Bullock v. Caird* (b), by the Court of Queen's Bench. In that case the action was brought against a single defendant, for a breach of an agreement entered into between the plaintiffs and C. & Co.; and the defendant pleaded that there was a trading partnership or firm domiciled and carrying on business in Scotland by the name of C. & Co., of which he was a member ; that by the Scotch law, the firm was a distinct person from any or the whole of the individual members, and was capable of maintaining the relation of debtor and creditor separate and distinct from the obligations of the partners as individuals, and of holding property, and of suing and being sued as a separate person by the name of C. & Co. ; that by the law of Scotland, the defendant, as a partner in the firm, was liable to the plaintiffs for the satisfaction of any judgment which might be obtained against the firm or the whole of the individual members jointly for any breaches of the agreement ; and that it was a condition precedent to any individual liability attaching to the defendant as an individual member of

(a) *General Steam Navigation Co. v. Guillou*, 11 M. & W. 877, 895.

(b) L. R. 10 Q. B. 276.

the firm in respect of the agreement, that the firm, as such person, or the whole individual partners jointly, should first have been sued, and that judgment should have been recovered against the firm or the whole of the partners jointly; and that the plaintiffs had not sued the firm or the whole of the partners jointly, or recovered judgment against it or them. It was held, on demurrer, that all the matters stated in the plea were mere matters of procedure, and that the plea was bad, Blackburn, J., saying that the non-joinder of the other members of the firm might be a bar to an action in Scotland, but could only amount in England to a plea in abatement (a). So where a colonial statute gave a mode of proceeding against a colonial banking company by suing their chairman as nominal defendant, and enforcing the judgment against Local provi-
the property of the members, and judgment had in fact sions directory as to been recovered against the chairman under this provision, procedure. it was held that a member of the banking company might nevertheless be sued individually in England (b). It is true that it was said in the judgment that the colonial statute was merely cumulative, and left all the previous rights and liabilities of the parties untouched; but it is submitted that the decision would have been the same even if the colonial statute had made the recovery of judgment against the chairman a necessary preliminary to fixing any liability on the individual members, such a provision relating merely to procedure, and only indicating the proper mode of bringing home the liability, instead of taking it away altogether. As Lord Campbell expressed it, such an act imposed no new liability, but only regulated the mode in which the existing liability should be judicially constituted (c). Such provisions clearly do not affect the right of the creditor to pursue his remedy here in the manner provided by the law of this country; nor will any further special enactment, regulating the manner and

(a) *Bullock v. Caird*, L. R. 10 Q. B. 278.(b) *Bank of Australasia v. Harding*, 9 C. B. 661; 19 L. J. C. P. 345.(c) *Bank of Australasia v. Nias*, 16 Q. B. 717, 734.

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Statute of
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conditions of executing a judgment, so obtained against such a nominal defendant, upon the property of the members of the company, have any wider operation beyond the tribunals to which it is immediately addressed (a).

(ii.) *Time within which the Action must be brought.*— Statutes of limitation may be regarded from a double point of view; either as extinguishing and discharging the right of action altogether, or as merely suspending and denying a remedy. Nor has any branch of private international law given rise to greater discussion than the attempt to decide which is in truth their proper character; whether they are, in short, laws which govern the inherent liability of the obligation, or rules of procedure dictated by the *lex fori*, and binding in the *forum* alone. They may, in fact, be either. It is competent to any legislature to enact that rights of action, not put in force within a certain time, shall be absolutely extinguished; and such an enactment will have a right to claim recognition in any tribunal, whenever a contract made with reference to it as the dominant law (b), shall come in question. “I should be much inclined to hold,” says Cockburn, C.J., “that when by the law of the place of contract an action on the contract must be brought within a limited time, the contract ought to be interpreted to mean ‘I will pay on a given day, or within such time as the law of the place of contract can force me to pay’” (c). That this *dictum* does not express the English law, according to the current of authority, is admitted by the learned judge whose opinion is quoted in the same judgment, but if for the last phrase were substituted the words “within such time as the law of the place of contract provides that any obligation shall remain valid and unextinguished,” its authority would be incontrovertible. It has been repeatedly decided that the English law of limitations with regard to obligations and movables generally, does not go to this extent, but merely fixes a limit within which, in

(a) *Kelsall v. Marshall*, 16 Q. B. 241.

(b) *Ante*, p. 309.

(c) *Harris v. Quine*, L. R. 4 Q. B. 653.

an English Court, the action must be brought; and that foreign statutes of limitation, framed in similar terms, have no larger effect (*a*). The English statute with regard to real property (3 & 4 Will. IV. c. 27), on the other hand, does not merely bar the remedy, but extinguishes the right. The *lex situs*, in fact, as to prescription with regard to immovables, exacts universal recognition (*b*).

It cannot be denied that this interpretation of the English statutes of limitation has met with severe and pertinacious criticism; and Westlake, in particular, attacks the cases which had been decided when he wrote, and the unhesitating expression of the opinion of Story on the subject, with considerable energy. He states that "the opinion which refers the question to the *lex fori*, as one of procedure, rests upon two fallacies." The first of these alleged fallacies is the contention that the breach of the contract cannot have been in the mind of the contracting parties, and that the limitation, therefore, is not of the nature of the contract; a fallacy, which in his opinion is due to a confusion between the interpretation of the contract and the operation on it of the *lex loci contractus*. It is, however, now settled that the operation of the *lex loci* on the contract, no less than the interpretation of the contract itself, is entirely dependent upon the intention of the parties (*c*). The *lex loci* cannot, therefore, operate upon the contract at all except so far as it was intended to do so by the parties when they entered into the contract; and the argument that what they did not contemplate or intend ought not to be governed by that law, is certainly entitled to some consideration. The second alleged fallacy is the distinction, drawn by Lord Brougham in *Don v. Lippman* (*d*), by which most of the

(*a*) *Harris v. Quine*, L. R. 4 Q. B. 653; 38 L. J. Q. B. 331; *Pardo v. Bingham*, L. R. 4 Ch. 735; 39 L. J. Ch. 170; *Ruckmaboye v. Mottichund*, 8 Moo. P. C. 36; *Lopez v. Burslem*, 4 Moo. P. C. 300; *British Linen Co. v. Drummond*, 10 B. & C. 903; *Huber v. Steiner*, 2 Bing. N. C. 202; 2 C. B. 304; *Chitty on Contracts*, ed. 10, p. 741.

(*b*) *Per Lush, J.*, L. R. 4 Q. B. 658; *Pitt v. Dacre*, L. R. 3 Ch. D. 295.

(*c*) *Lloyd v. Guibert*, L. R. 1 Q. B. 115, *ante*, p. 315; and cases there cited.

(*d*) 5 Cl. & F. 1, 16.

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subsequent decisions have been swayed, that the debt may be left subsisting and owing, though the remedy is denied. In Westlake's opinion, there is little or no meaning in saying that a debt subsists which cannot be recovered. The statutes of limitation referred to, of the same class as the English statute with regard to personal obligations, do not however say this. They simply say that the debt shall not be recovered in the Courts over which they claim authority. The creditor may recover his debt in any other Court, if the procedure of that other Court allows him. There are, indeed, other ways in which a debt may be said to subsist, though it cannot be put in suit. It may, for example, so subsist as to preserve a lien on the goods of the debtor until it is satisfied (*a*), or so as to cause the right of action to revive by a subsequent promise. It is unnecessary, however, to have recourse to such considerations, inasmuch as the distinct ground, upon which the English and certain other statutes of limitation have been held to refer to procedure, has been that they do not intend or purport to forbid the cause of action from being put in force, after the specified term, in any Courts except their own. They are commands addressed to their own tribunals. Did they purport to be more than this, they would cease to be rules of procedure at all, and would absolutely extinguish such rights of action as properly came within their jurisdiction (*b*).

The cases (*c*), therefore, which appeared to Westlake in 1858 insufficient to do more than leave "the whole subject still open for the higher English tribunals," have since received repeated sanction; and it is now established beyond doubt that a law which simply prescribes the time within which a *cause in action* must be put in force relates to procedure alone, and has no validity except in the tribunals to which it belongs and is ad-

(*a*) *Spears v. Hartley*, 3 Esp. 81, 82; *Higgins v. Scott*, 2 B. & Ad. 413.

(*b*) See Westlake, Priv. Int. Law, §§ 250–253; Story, Conflict of Laws, § 576, *sqq.*

(*c*) *British Linen Co. v. Drummond*, 10 B. & C. 903; *Huber v. Steiner*, 2 Bing. N. C. 202; *Don v. Lippman*, 5 Cl. & F. 1.

dressed (a). And in those tribunals, it applies to all contracts, wherever made; and to all parties, whatever their nationality or domicil. Thus, in *Pardo v. Bingham*, the English Statute of Limitations was held to apply, though the debt was contracted in Venezuela, where the debtor and creditor were both resident at the time and afterwards. "A certain period is fixed by the statute," said Lord Hatherley, "which binds everybody who comes to sue before this *forum*" (b). And where a statute (5 Geo. IV. c. 113, s. 29) provided that no appeal should be allowed from any sentence of any Court of Admiralty unless certain preliminary steps were taken within a given time, it was held that the enactment applied to foreigners as well as to British subjects. It was said in the judgment, that although the British Parliament had no general power to legislate for foreigners out of the dominions and beyond the jurisdiction of the Crown, yet it could by statute fix a time within which application must be made for redress to the tribunals over which it had authority; and that this was matter of procedure, which was a law of the *forum*, and bound in that *forum* all mankind, whether foreigners or subjects, plaintiffs or defendants, appellants or respondents (c). So exclusively is such a law matter of procedure, that a foreign judgment declaring that a claim is barred by a local statute of limitations is no bar to an action in the tribunals of another State, the laws of which fix a longer term of limitation of suit, on the original cause of action (d). In such a case, the maxim *nemo bis debet vexari pro eadem causa* does not apply, the plea upon which the foreign judgment has been given not going to the merits of the cause of action. It will be shewn subsequently that this condition must be complied with, in order that a foreign judgment should be set up as a conclusive bar here (e).

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Foreigners
controlled by
lex fori as to
limitations.

(a) *Harris v. Quine*, L. R. 4 Q. B. 653; 38 L. J. Q. B. 331; *Pardo v. Bingham*, L. R. 4 Ch. 735; 39 L. J. Ch. 170; *Pitt v. Dacre*, L. B. 3 Ch. D. 295.

(b) *Pardo v. Bingham*, L. R. 4 Ch. 735.

(c) *Lopez v. Burslem*, 4 Moo. P. C. 300.

(d) *Harris v. Quine*, L. R. 4 Q. B. 653; 38 L. J. Q. B. 331; *Don v. Lippman*, 5 Cl. & F. 1.

(e) *Garcias v. Ricardo*, 14 Sim. 265; 14 L. J. Ch. 339; *infrà*, Chap. XI.

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It only remains, while on this subject, to advert to a distinction cited with approval from Story in *Huber v. Steiner* (*a*), between cases where a foreign law of limitation is merely the *lex loci contractus*, and those in which the parties have resided within the jurisdiction of the law during the whole period, so that it has had full operation upon the case. Westlake omits to notice that Story adds the further condition that the law should be one which declares that the claim at the expiration of the statutory period shall become a nullity, and not merely that the remedy shall be barred. Unless such was its nature, it is clear that it would still remain a law of procedure only, and that the additional fact of the parties having resided within its jurisdiction would not give it greater strength or wider operation. No doubt this fact would be an additional reason for admitting the universal validity of the law, if it was a law like the English statute which limits suits relating to immovables (3 & 4 Will. IV. c. 27), which extinguished the right; but it has been already said that such a law is not one of procedure at all, and claims universal recognition without the aid of any additional considerations, such as that the parties have resided for the full period within its jurisdiction.

(iii.) *Mode of suing and enforcing Process.*—No part of the subject is less involved with considerations of the proper respect to be paid to the law which created the right than this; and, accordingly, no part of it is to be referred with less hesitation to the *lex fori* for an authoritative decision. It is, indeed, almost unnecessary to multiply authorities for the proposition that the “forms of remedies and modes of proceeding” are regulated solely by the law of the place where the action is instituted (*b*); but it may be more useful to illustrate it by citing a few examples of its application. How far it

(*a*) 2 Bing. N. C. 202.

(*b*) *Ferguson v. Fyffe*, 8 Cl. & F. 121; *Trimbey v. Vignier*, 1 Bing. N. C. 151; *General Steam Navigation Co. v. Guillou*, 11 M. & W. 877; *De la Vega v. Vianna*, 1 B. & Ad. 284; *Pardo v. Bingham*, L. R. 6 Eq. 485; *Ex parte Melbourn*, L. R. 6 Ch. 64; 40 L. J. Bank. 65.

applies to the question of the reception of evidence, or of the sufficiency of evidence when received to support an action, will be considered subsequently (*a*) ; and it has already been shewn that the prescription of the time within which an action must be brought is properly regarded as coming under the same general rule. That all questions of priorities between creditors depend upon the *lex fori* was decided as far as cases of bankruptcy are concerned by *Ex parte Melbourn*, just cited ; and the same rule has more than once been held to be applicable to administrations (*b*). Not only the priority of a creditor, but in some cases his right to prove his debt at all, may in some instances be decided by the *lex fori*. The former rules of English bankruptcy law, for example, which exclude in certain cases a right of double proof against two firms to which the same individual or individuals belong (*c*), have been held to apply to a creditor attempting to prove under an English bankruptcy, after proof under what was tantamount to a bankruptcy in the Brazils (*d*) ; and the fact that in the case cited the bills which were the subject of the proof had been accepted in England, though mentioned by *Turner*, L.J., seems immaterial. So an execution creditor who attempts in a foreign court to attach and sell property of a bankrupt firm actually situate in the foreign jurisdiction, may be justified by the *lex fori* in doing so, although the English law would not have permitted it ; and the assignees of one of the members of the firm, who has become bankrupt in England, cannot compel him by suit in England to refund what he has recovered (*e*). It seems difficult, indeed, to suggest any true principle upon which such an interference with the operation of the *lex fori* and *situs* could

(*a*) *Infrà*, p. 431.

(*b*) *Pardo v. Bingham*, L. R. 6 Eq. 485 ; *Cook v. Gregson*, 2 Drew. 286 ; *Preston v. Melville*, 8 Cl. & F. 1.

(*c*) But now see the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 37, extending the provisions of 24 & 25 Vict. c. 134, s. 152.

(*d*) *Ex parte Goldomid*, 1 De G. & J. 257, 285 ; *Goldomid v. Cazenove*, 7 H. L. 785.

(*e*) *Brickwood v. Miller*, 3 Mer. 279 ; and see *Stein's Case*, 1 Rose, 462.

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Suit.

Set-off.

be warranted, even if the partnership were domiciled and resident in England, and the attached property alone situate within the foreign jurisdiction; though any Court which can give the creditor his full distributive share of the whole partnership property, or withhold it from him, can no doubt practically obtain full recognition for its rules (a). Thus, when a company has in this country been ordered to be wound up, judgment creditors who are in this country and have proved under the winding-up, will not be allowed to attach, or retain when attached, property in India belonging to the company (b). The subject has already received some consideration (c).

The rule that set-off, on the other hand, is a mere matter of procedure, not of the substance of the contract between the parties, and that it is consequently dependent on the *lex fori*, is not so clearly established. It is, however, difficult to see in what sense it can be said to be part of the original obligation, that the defendant in an action of contract should be able to defeat part of the claim against him by setting up a perfectly distinct claim of his own against the plaintiff. In such a case, each litigant, plaintiff and defendant, has, strictly speaking, a *chose in action* of his own; and a *chose in action* can of its own nature be enforced only by action. The law of some particular *forum* may and does allow the defendant to make a different use of his claim, by striking a balance between it and the claim of the plaintiff; but that appears to be a privilege conferred by the *lex fori*, and in no sense part of the contract. The express contract between the parties may, of course, provide that the claim of the plaintiff, when it arises, should be set against a specified demand of the defendant; but in such a case the defendant's plea is not really one of set-off, but of an express term of the original contract. The point was raised, though not directly decided, in *Macfarlane v.*

(a) *Barker v. Goodair*, 11 Ves. 78; *Dutton v. Morison*, 17 Ves. 201; 1 Rose, 218; *Sill v. Worwick*, 1 H. Bl. 665; *Hunter v. Potts*, 4 T. R. 182.

(b) *In re Oriental Steam Co., Ex parte Scinde Ry. Co.*, L. R. 9 Ch. 557.

(c) *Ante*, p. 233.

Norris (a), where Cockburn, C.J., intimated that he was inclined to take the view indicated above, and this *dictum* has been since followed (b). The most recent American authorities are to the same effect (c). In *Allen v. Kemble* (d), which has been cited on the other side in support of the proposition that the right of set-off is really part of the original obligation, there was no conflict between the *lex fori* and the *lex loci contractus* at all; and the only question was whether the contract of the drawer of a bill of exchange was governed by the law of the place where the bill was drawn, or where it was payable.

It is plain, however, that the *lex fori* can never confer a right of action which had no existence by the law which was properly competent to create the obligation. Thus it has been already said that a tort, to be actionable, must be actionable by the law of the place where it was committed, as well as by the law of the tribunal (e). Consequently, the better opinion would seem to be that an act which is a criminal offence, but not a personal tort, by the *lex loci*, cannot be the ground of an action here, though by the *lex fori* it might be both. It is true that Wightman, J., in *Scott v. Seymour* (f), intimated an opinion that if a trespass was not lawful or justifiable by the law of the country where it was committed, the mere fact that no personal right to recover damages for it was given by that law would not deprive the person aggrieved of the right of action given to him by English law, at any rate when both the parties were British subjects. This *dictum*, however, was not assented to by the other members of the Court; and the fallacy involved in it has been already pointed out (g). In strict accordance with the principle here advocated, it was said in an older case that no rule of procedure could avail to give a personal right of action against a contractor, where the *lex loci actus* recognised no right to enforce the obligation at all against the person of

(a) 2 B. & S. 783.

(b) *Meyer v. Dresser*, 33 L. J. C. P. 289.(c) See Story, Conflict of Laws, § 575, and American cases there cited.
(7th ed.)

(d) 6 Moo. P. C. 314.

(f) 1 H. & C. 219.

(e) *Ante*, p. 396.(g) *Ante*, p. 397.

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Execution—
governed by
lex fori.

the party sued (*a*) ; and though this case has been disapproved by later authorities (*b*), the principle that the personal or real nature of the right must be determined once for all by the *lex loci* remains unassailed. The nature and extent of this principle will be better understood when the cases relating to process and execution have been considered.

Process, or the mode and proceedings by which the judgment and decrees of any tribunal are enforced, similarly depends upon the law of that tribunal alone (*c*). There may, however, be sometimes a difficulty in distinguishing the nature of the original liability on which the judgment is founded from the operation upon it of the law of a foreign Court as to execution. A man, for example, who contracts a debt in a country where imprisonment for debt is unknown, may argue with some plausibility that his contract never contemplated the alternative of personal confinement, by the threat of which the law of the country in which he is sued attempts to hold him to his bargain. From such a point of view, it would appear inequitable that he should be compelled to submit to the provisions of any law which he had not contemplated ; but there is a fallacy involved in this aspect of the subject altogether. The natural incidents of the contract, foreseen or unforeseen, are properly the subjects of the intention of the parties ; and in adjudicating upon them, it is of the highest importance to determine what the contracting parties contemplated, or to what law they intended to refer. Breach, however, is not a natural incident of the contract, but its dissolution. An obligation, it is true, remains ; but it is an obligation which arises, not out of the intention of the parties, but out of the refusal of one of them to carry that intention into effect (*d*). Consequently, with the incidents of breach, and the remedies

(*a*) *Melan v. Fitzjames*, 1 B. & P. 138.

(*b*) *Imlay v. Ellesfen*, 2 East, 453.

(*c*) *De la Vega v. Vianna*, 1 A. & Ad. 284 ; *Don v. Lippman*, 5 Cl. & F. 1 ; *Imlay v. Ellesfen*, 2 East, 453 ; *Brettillot v. Sandos*, 4 Scott, 201.

(*d*) *Don v. Lippman*, 5 Cl. & F. 1, 14.

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applicable to it, the intention of the parties can have nothing to do. The fallacy of supposing that those who contract undertake an alternative liability, to discharge their promise or to be compelled to do so by some particular law, within some particular time, or in some particular way, has already been shewn in treating of Statutes of Limitation (*a*). Persons who contract engage simply to perform their promise; and if they fail to carry out their undertaking, they must submit to the control of any law within the reach of which they happen to be when a remedy is sought. To break a contract is, in truth, an offence; or if not a public offence, is at any rate a personal tort. There is no greater reason why a man who fails to fulfil a promise should be heard to object to any law which properly asserts jurisdiction over him, than why a man who injures another by defamation or actual assault should do the same.

The sole question, therefore, which must in such cases Enforcement of personal liability. be decided, is whether the contractor assumed, by his agreement, a personal liability or not. If he intended to bind his person for the fulfilment of his promise—and all personal undertakings must necessarily be taken, in the absence of anything to the contrary, to have that effect—then every tribunal under whose jurisdiction he may come will enforce that personal liability in its own way. If, on the contrary, his person, according to his intention and the competent *lex contractus*, was never bound at all, then no foreign law can impose a personal liability for the breach or non-fulfilment of what was never a personal undertaking (*b*). Thus in *Melan v. Fitzjames* the defendant was held to bail in England on an instrument entered into in France, by which his property only, and not his person, was according to the law of France made liable, and the Court of Common Pleas ordered the bail-bond to be delivered up and cancelled on the defendant entering

(*a*) *Ante*, p. 421.

(*b*) *Melan v. Fitzjames*, 1 B. & P. 188; *Talleyrand v. Boulanger*, 3 Ves. 447; *De la Vega v. Vianna*, 1 B. & Ad. 284.

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a common appearance. "The defendant is held to bail," said Eyre, C.J., "on a contract made in France, the nature of which we must learn, not from the face of the instrument, but from evidence. If it appears that this contract creates no personal obligation, and that it could not be sued as such by the laws of France, there seems to be fair ground on which the Court may interpose to prevent a proceeding so oppressive as a personal arrest in a foreign country, at the commencement of a suit, in a case which, as far as we can judge at present, authorizes no proceeding against the person in the country in which the transaction passed. If there could be none in France, in my opinion there can be none here. I cannot conceive that what is no personal obligation in the country in which it arises can ever be raised into a personal obligation by the laws of another. If it be a personal obligation there, it must be enforced here in the mode pointed out by the law of this country; but what the nature of the obligation is must be determined by the law of the country where it was entered into, and then this country will apply its own law to enforce it" (a). It should be remarked that Heath, J., dissented from the above view, but only on the ground that the contract sued on was in his opinion a personal one, and that the question of arrest was therefore merely one of remedy. On the assumption that the contract was not a personal promise by French law, but a mere hypothecation of property, the decision was no doubt right; but that the view taken by Heath, J., was in reality more consonant to the facts of the case, appears from the opinion which Lord Ellenborough intimated in *Imlay v. Ellesfon* (b), and from the later decision in *De la Vega v. Vianna* (c), which may be regarded as having settled the law on the subject. In *Don v. Lippman* (d), the general principles applicable to such cases were stated with much clearness by Lord Brougham. "The contract being silent as to the law by which it is to be governed,

(a) *Melan v. Fitzjames*, 1 B. & P. 138, 141; and see *Talleyrand v. Boulangier*, 3 Ves. 447.

(c) 1 B. & Ad. 284.

(b) 2 East, 453.

(d) 5 Cl. & F. 1, 13.

nothing is more likely than that the *lex loci contractus* should be considered at the time the rule (sc. of the remedy), for the parties could not suppose that the contract might afterwards come before the tribunals of a foreign country. But it is otherwise when the remedy actually comes to be enforced. The parties do not necessarily look to the remedy when they make the contract. They bind themselves to do what the law they live under requires; but as they bind themselves generally, it may be taken as if they had contemplated the possibility of enforcing it in another country. . . . Not only the principles of the law, but the known course of the Courts renders it necessary that the rules of precedent should be adopted, and that the parties should take the law as they find it, when they come to enforce their contract. . . . The distinction which exists as to the principle of applying the remedy, exists with even greater force as to the practice of the Courts when the remedy is to be enforced. No one can say, that because the contract has been made abroad, the form of action known in the foreign court must be pursued in the courts where the contract is to be enforced, or the other preliminary proceedings of those courts must be adopted, or that the rules of pleading, or the curial practice of the foreign country, must necessarily be followed. . . . No one will contend in terms that foreign rules of evidence should guide us in such cases; and yet it is not so easy to avoid that principle in practice if you once admit, that though the remedy is to be enforced in one country, it is to be enforced according to the laws which govern another country" (a).

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Proof.

(iv.) *Evidence necessary and admissible to support an action.*—This branch of the subject has been already considered when treating of formalities, and it is unnecessary to do more here than recapitulate the conclusions arrived at. The *lex fori* decides all questions relating to the *admissibility* of evidence; but if the evidence, when admitted, goes to shew that no obligation was ever validly created

Evidence
governed by
lex fori.

(a) *Per Lord Brougham, in Don v. Lippman, 5 Cl. & F. 1, 13, 14.*

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by the *lex loci*, and not merely that the obligation, though duly created, could not have been proved in the foreign tribunal, the rules of the *forum* as to procedure will not, of course, be allowed to create an obligation where none existed before (a). Similarly, when the *lex fori* demands a particular kind of evidence to support a particular kind of contract, no obligation arising from such a contract can be recognised, although it may in the first instance have been validly created by the *lex loci actus*, and could be put in suit in a foreign court. The English Statute of Frauds has accordingly been held to apply to contracts made abroad, and sued upon here (b). The necessity of distinguishing between the formalities preliminary to the validity of the contract, and those preliminary to the enforcement of the remedy in the country where it was made, will be seen from the case of *Ex parte Melbourn* (c), which has been already cited ; and it is plain that it will be necessary to prove the former in every tribunal, while the latter will be dispensed with everywhere but in the courts of the *locus celebrationis*.

The law on this subject has been briefly expressed by Lord Brougham in *Bain v. Whitehaven and Furness Railway Company* (d). Whether a witness is competent or not; whether a certain matter requires to be proved by writing or not; whether certain evidence proves a certain fact or not : that is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced, and where the Court sits to enforce it.

Foreign facts
—how proved.

(v.) *Proof of facts peculiarly foreign.*—The amount of evidence necessary to support a right of action in any particular tribunal, and the admissibility of the evidence offered for that purpose, being thus determined by the *lex fori*, it remains to consider what kind of evidence is required by the Court when investigating certain peculiarly foreign facts. It is unnecessary to say that the

(a) *Bristow v. Sequeville*, 5 Ex. 275, 279 ; *Alves v. Hodgson*, 7 T. R. 241 ; *Clegg v. Levy*, 2 Camp. 166.

(b) *Leroux v. Brown*, 12 C. B. 801 ; *Acebal v. Levy*, 10 Bing. 376.

(c) L. R. 6 Ch. 64.

(d) 3 H. L. C. 1, 19.

ordinary rules of evidence apply indiscriminately to the proof of *res gestae* and other incidents relevant to the cause of action, wherever they may have taken place; but it is not equally apparent what rules apply to the proof of foreign documents, or of foreign law. First, with regard to foreign documents, it is clear that the Court must have the evidence of a translator; a translator being, in the words of Lord Chelmsford, a witness as to the meaning and also the grammatical construction of the words (a). Next, it must have evidence, adduced by foreign experts if necessary, of the meaning of any words which are of a technical description, or which have a peculiar meaning, different from that which, if literally translated into our language, they would bear. If the instrument is not only written in a foreign language, but to be controlled by a foreign law (b), according to any of the principles already laid down, then if there is any principle of construction applicable to that document by such foreign law, the foreign law on this point must be proved in the manner which will be shewn below. The judge "has not organs to know and to deal with the text of the foreign law, and therefore requires the assistance of a lawyer who knows how to interpret it" (c). The witnesses having supplied the judge with these facts, they must retire and leave his sufficiently informed mind to his own proper office—that of ascertaining for himself the intention of the parties; or, in other words, of construing the instrument in question (d). So, if there is a foreign custom which affects the construction of a foreign document, witnesses must be heard to explain what the custom is, as evidence is received of customs in respect of trade matters, before the judge can pronounce upon the proper effect to be given to it (e). But the foreign document, though con-

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Proof of
foreign
documents.

Proof of
foreign law.

(a) *Di Sora v. Phillips*, 10 H. L. C. 624, 639.

(b) As to the proper law to govern the construction of foreign contracts, *vid. ante*, p. 301.

(c) *Per Lord Brougham in the Sussex Peerage Case*, 11 Cl. & F. 115.

(d) *Di Sora v. Phillips*, 10 H. L. C. 624, 639.

(e) *Per Lord Mansfield*, in *Mostyn v. Fabrigas*, Cowp. 174; 1 Sm. L. C. 677.

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documents.**

strued according to the foreign law to which it is generally subject, and explained by reference to foreign facts, is only admissible in evidence, as has been said, according to the rules of the *lex fori*, and no foreign law will avail to make that primary evidence in a foreign court which is secondary evidence according to the law of procedure which is there followed (*a*). Where, however, a particular value is given by the foreign law to a foreign document as proof of a fact within the jurisdiction of that law, the same weight will be given to it in any other tribunal, when the foreign law is proved to its satisfaction. Thus, where it was desired to prove a marriage in France which was celebrated before the Revolution, and it was proved by French advocates that registers of marriage were kept at Lille by official authority, and that those registers were authentic documents both before and since the Revolution, properly authenticated copies of these were admitted to prove the marriage (*b*). And in a more modern case, a document was tendered to prove a marriage in Chili, which purported to be an extract from a register of marriages, signed by the curate-rector of the Chilian church where it was solemnized. The signature was duly verified by a public notary, and certified under the hand and seal of the British Consul. On proof being adduced that a register was kept by the curate-rector of every church in Chili of the marriages solemnized in it, and that certificates of marriages such as that tendered were received in the Chilian Courts as evidence of the marriage which they purported to certify, the document was received to prove the marriage in question (*c*). But a copy of a foreign judgment, certified in a similar manner, will not be entitled to reception here, every tribunal being of course entitled to lay down for itself the manner in which it will take cognizance of the decrees of a foreign Court (*d*). It is now provided by statute that all judgments, decrees, orders, or

(*a*) *Brown v. Thornton*, 6 A. & E. 185.

(*b*) *Biddulph v. Lord Camoys*, cited by Keating, J., 29 L. J. P. & M. 58.

(*c*) *Abbott v. Abbott*, 29 L. J. P. & M. 57.

(*d*) *Appleton v. Lord Braybrooke*, 6 M. & S. 34; and see 9 Mod. 66.

other judicial proceedings of any court of justice in any foreign state or in any British colony, and all other affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies, or by authenticated copies purporting to be sealed with the seal of the court to which the original belongs, or, in the event of such court having no seal, to be signed by the judge or one of the judges of the said court; and that it shall not be necessary to prove the seal or signature with which such authenticated copy purports to be sealed or signed (a). Similar provisions are contained in the same statute for the proof of proclamations, treaties, and other foreign acts of State.

The proof of foreign law is mainly controlled by the principle that the law of a foreign State is a fact which must be established by evidence like any other, and of which no tribunal or judge has a right to take judicial notice. No judicial knowledge or discernment is attributed to a judge in such a matter; and if proper proof of a foreign law is not adduced, the Court must proceed according to the law of England (b). All that can be required of a tribunal adjudicating on a question of foreign law is to receive and consider all the evidence as to it which is available, and *bona fide* to determine on that, as well as it can, what the foreign law is. If from the imperfect evidence produced before it, or its misapprehension of the effect of that evidence, a mistake is made, it is much to be lamented, but the tribunal is free from blame (c). The judge "has not organs to know and to deal with the text of the foreign law, and therefore requires the assistance of a lawyer who knows how to interpret it" (d). How

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(a) 14 & 15 Vict. c. 99, s. 7.

(b) *Lloyd v. Guibert*, L. R. 1 Q. B. 115, 129; *Brown v. Gracey*, D. & B. N. P. 41, n.

(c) *Castrique v. Imrie*, L. R. 4 H. L. 414, 427.

(d) *Sussex Peerage Case*, 11 Cl. & F. 115, *per* Lord Brougham.

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Foreign law— whether examinable by Court.

far the function of the judge is limited to the reception of this evidence and this assistance, is perhaps not wholly free from doubt. It was said by Lord Langdale, that though a knowledge of foreign law is not to be imputed to the judge, there may be imputed to him a knowledge of the general art of reasoning; and that there may therefore be cases in which the judge may, without impropriety, take upon himself to construe the words of a foreign law, and determine their application to the case before him, especially if there should be a variance or want of clearness in the testimony (*a*). The same view had been apparently adopted by Lord Stowell in earlier cases (*b*), limiting the exercise of this function to the consideration of those authorities which were directly referred to by the witnesses; but, as Lord Langdale remarked in the case cited, a judge endowed as Lord Stowell was might perhaps safely do some things which other judges might find it very hazardous to imitate. Nor is there any other direct authority for the proposition that a judge may of his own mere motion look even at the written or printed laws of a foreign State. In a recent case in the Exchequer Chamber, the provisions of the French *Code de Commerce* were, no doubt, examined critically by the Court, but it is especially remarked in the judgments that the whole Code was, *by agreement of the parties*, considered to be in evidence (*c*). The doctrine that it is necessary to prove foreign law as a fact by oral testimony was not therefore impugned, nor is the case even an authority for the admissibility in evidence of the statute law or codes of a foreign country, where the objection is not waived. The objection, though not waived, does not appear to have been taken in *Trimbley v. Vignier* (*d*), in which the same articles of the *Code de Commerce* came in question, and were no doubt looked at by the Court. "Upon this point of French law," says

(*a*) *Nelson v. Bridport*, 8 Beav. 537.

(*b*) *Lindo v. Belisario*, 1 Hagg. Cons. 216; *Dalrymple v. Dalrymple*, 2 Hagg. Cons. 54.

(*c*) *Bradlaugh v. De Rin*, L. R. 5 C. P. 473.

(*d*) 1 Bing. N. C. 151, 158.

Tindal, C.J., "the opinions of the foreign advocates which have been taken by consent since the trial of the cause, appear to be contradictory; but as each of them founds his opinion on the *Code de Commerce*, Arts. 137, 138, we feel ourselves at liberty to refer to the text of that Code, in order to form our own judgment on the point." It will be observed that in that case the opinions of the foreign advocates was taken by consent after the trial, and the disputed articles of the Code were in fact quoted in those opinions; so that both litigants appear to have waived their right to object to anything beyond the testimony of an expert. It is obvious that there is considerable danger in permitting any judge to attempt the construction and application of a foreign code or statute for himself. The opinion of a continental judge, for example, upon the fourth section of the Statute of Frauds, given in ignorance that it had ever been the subject of judicial decision, would certainly be more likely to be wrong than right; and the stricter view would seem to be that a litigant has a right to demand, if he chooses, that the opinion of the witnesses as to the foreign law shall be accepted as conclusive, without any attempt being made by the judge to supplement it by an examination of the foreign law for himself. It is the office of the judge in such a case to decide upon the testimony submitted to him, not upon the comparative validity of the reasons given by the witnesses in support of their opposite opinions (a); and the distinction between the task of construing a foreign document or contract after the law affecting it has been proved, and the task of ascertaining that law as a preparatory step towards doing so, will be well seen from the case just cited. The authorities, however, for the proposition that foreign written law may be looked at by the judge, are entitled to considerable respect, and in the *Sussex Peerage* case (b) Lord Campbell gave his opinion in favour of that view in oppo-

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(a) *Di Sora v. Phillips*, 10 H. L. C. 624, 638.

(b) 11 Cl. & F. 85, 114; see *Baron de Bode's Case*, 8 Q. B. 208; *Millar v. Heinrich*, 4 Camp. 155; *Lacon v. Higgins*, 3 Stark. N. P. C. 178; *Picton's Case*, 30 How. St. Tr. 491; *Middleton v. Janverin*, 2 Hagg. Cons. 437.

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Foreign law
—proved by
experts.

sition to that taken by Lord Brougham. The Supreme Court of the United States, in a judgment cited at length by Story (*a*), recently expressed their opinion that the true rule was, that a foreign written law may be received when it is found in a statute book, with proof that the book has been officially published by the Government which made the law. It has already been said that the more recent English cases are, on the whole, unsavourable to this view; and that there is great and obvious danger of error in any attempt to construe the written code of a foreign law, without the aid of foreign lawyers to explain it (*b*).

Whatever may be the true rule, however, as to the right of the Court to look at the written or printed laws of a foreign country, it is certain that all foreign law may, and all unwritten foreign law must, be proved by parol evidence. The only witness competent to give such evidence is some person who is conversant with the foreign law, either as a legal practitioner in the foreign State, or as holding some other office there the duties of which would entail such knowledge. It does not appear necessary that he should be a legal practitioner or professor, at any rate if the law (*c*) to be proved is a mercantile custom; but it is clearly not sufficient that his knowledge of the law of the foreign State should be derived from his having studied it in another country (*d*). If this were enough, as Alderson, B., observed in *Bristow v. Sequeville*, why should not a Frenchman, who had read books relating to Chinese law, be called to prove what the law of China really is? And in a case, at present unreported, before Sir James Hatten in the Probate Division of the High Court, in June, 1878 (*Cartwright v. Cartwright* (*e*)), it was held that the Canadian marriage law could not be proved

(*a*) Story, *Conflict of Laws*, § 641, *a* (*n.*)

(*b*) *Per Blackburn, J.*, in *Castrique v. Imrie*, 39 L. J. C. P. 350, 355.

(*c*) *Vanderdonckt v. Thellusson*, 8 C. B. 812.

(*d*) *Bristow v. Sequeville*, 5 Ex. 275; 19 L. J. Ex. 289; *In the Goods of Bonelli*, L. R. 1 P. D. 69.

(*e*) Now reported (June 22), 26 W. R. 684.

by the testimony of an English barrister, who had enjoyed a large practice in Canadian appeals before the Judicial Committee of the Privy Council; such a practitioner not being an expert, in the contemplation of law, qualified to give evidence concerning the law of those countries for which the Privy Council is the ultimate Court of Appeal. Such a witness must be a person *peritus virtute officii*, according to Lord Lyndhurst (*a*), from whose language it appears further that where the witness has no *officium*, he can have no *peritia*; and therefore that a mere resident in a foreign country is not a competent witness to prove its law (*b*). It must be doubted whether the decision of Lord Tenterden, that a French vice-consul in England is *peritus virtute officii*, so as to be a competent witness to prove French law, would be followed at the present day.

In addition to this ordinary and common law method of proving foreign law, it was enacted by the Legislature in 1861 (24 Vict. c. 11) that in any action in one of the English superior courts, and now therefore in any action in any of the divisions of the High Court of Justice, it shall be competent for the Court to state and remit a special case to a superior court of any foreign country with which a convention to that effect shall have been made, in order to ascertain the law of that foreign country; and that a certified copy of the opinion of the foreign Court upon the case submitted to it shall be admitted to prove the foreign law. The opinion of the foreign Court, however, is not to be conclusive evidence, as the second section of the same Act authorizes the English Court to apply the opinion to the facts, in the same way as if it had been pronounced by itself upon a case reserved or upon a special verdict, "if it shall think fit." The third section of the Act authorizes the English Courts to pronounce opinions upon cases similarly remitted to them by foreign States; but it must of course be noted, that these

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(*a*) *Sussex Peerage Case*, 11 Cl. & F. 85, 134, where *R. v. Dent*, 1 C. & K. 97, is said to be not law; see also *R. v. Picton*, 40 How. St. Tr. 509; *Ward v. Dey*, 7 Notes of Cases, 96.

(*b*) *Ibid.*

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SUMMARY.**PROCEDURE.**

- p. 412. The remedy is to be enforced according to the mode of the *lex fori*, though the right of action be sometimes indirectly affected by the application of the rule. Thus,
- p. 413. (i.) (a.) The *lex fori* controls the question of the name in which the action is to be brought, but not the title to a right of action, when that affects the ultimate direction in which its benefits are to flow. Title validly conferred creates a foundation for procedure.
- p. 417. (b.) So liability is determined by the proper law which imposes it, but when a personal liability is once imposed, the mode in which it is enforced, as, for example, by joint or several procedure, depends upon the *lex fori*.
- p. 420. (ii.) The *lex fori* determines the time within which an action may be brought; that is, the time within which an obligation may be enforced depends upon the law of the tribunal which is asked to enforce it. But when the competent law has declared that an obligation, after a given time, shall be extinguished, and not merely rendered incapable of being enforced in a particular tribunal, the law of another tribunal cannot, by fixing a longer term of pre-

scription, revive it. This qualification would seem to apply, whether the party against whom it is sought to revive the defunct obligation has resided during the whole term of prescription under the dominion of the *lex contractus* or *actus*, or not.

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(iii.) The *lex fori* determines the form and nature of the p. 424. action by which a personal liability is sought to be enforced, and the process or execution which the tribunal uses to enforce it. But the *lex fori* can never convert into a personal liability that which is not so by the law which created the obligation.

(iv.) The *lex fori* determines the evidence by which an p. 431. obligation must or may be proved. It cannot, however, create an obligation where none existed before, though it may refuse to recognise one that already exists.

(v.) All foreign facts, including the meaning of language p. 432. and the existence of laws, are objective facts to be proved, of which the Court will not take judicial notice.

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Foreign judgments—
how enforced.

CHAPTER XI.**FOREIGN JUDGMENTS.**

THE judgments or decrees of any tribunal have obviously no right to claim recognition beyond the jurisdiction of that tribunal on any principle akin to that which renders them binding within it. They are in fact the judicial orders of the sovereign power in the State, pronounced by the mouth of one of its tribunals; and can only claim to be carried into effect by the executive officers of that State within its limits (a). The comity of nations does, however, accord them a certain recognition, and it has been said by a celebrated American judge (b) that the Courts of England give as full effect to foreign sentences as is given to them in any part of the civilized world. Recognition may be accorded in three ways. The foreign judgment may either be adopted by the domestic Court as its own, and admitted to execution within its jurisdiction; or it may be received as evidence of the creation of an obligation; or lastly, it may be received as evidence of the original obligation, in a suit brought on the primary cause of action. The first of these methods, according to Westlake (c), is that generally followed on the Continent of Europe; though several of the continental nations, including France, enforce the judgments of other countries

(a) As to the proof of foreign judgments, see 14 & 15 Vict. c. 99, s. 7, and *ante*, p. 434.

(b) Marshall, C.J., in 4 Cranch, 270; Story, Conflict of Laws, § 590.

(c) Westlake, Priv. Int. Law, § 374.

only where there are reciprocal treaties to that effect ; the second is the mode adopted in England and America, and in countries which possess a cognate system of jurisprudence ; while in some few States, such as Sweden, Spain, and Norway, the plaintiff is relegated to his original cause of action. In England, then, a foreign judgment is ordinarily enforced by bringing an action Enforcement upon it ; and it is to be remarked that though it has been by action. said that this practice does not strictly rest upon "what is loosely called international comity" (a), it does rest strictly upon international comity, properly understood. According to Parke, B., "Where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial Courts are supported and enforced" (b). This statement of principle was cited and adopted by Blackburn, J., in *Godard v. Gray* (c) and *Schibbsby v. Westenholz*, just referred to, and is in reality only a variation of the general rule that obligations which have once been duly created by a competent and appropriate law will be recognised in all tribunals alike. The phrase comity of nations does emphatically mean this, or it means nothing (d). But though the most usual mode of enforcing a foreign judgment in England is by bringing an action upon it, the plaintiff is not obliged to take this course. A foreign judgment involves no merger of the original cause of action ; and it is therefore open to the plaintiff to sue upon that if he chooses (e). "This, being only a foreign judgment," said Bayley, J., in *Hall v. Odber*,

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(a) *Per* Blackburn, J., in *Schibbsby v. Westenholz*, L. R. 6 Q. B. 159.
 (b) *Williams v. Jones*, 13 M. & W. 633; *Russel v. Smyth*, 9 M. & W. 819.
 (c) L. R. 6 Q. B. 139.

(d) Story, *Conflict of Laws*, §§ 38, 38 a; Westlake, § 148; Huber, *De Conflictu Legum*, s. 2; *Dalrymple v. Dalrymple*, 2 Hagg. Cons. 59.

(e) *Smith v. Nicolls*, 5 Bing. N. C. 208; *Hall v. Odber*, 11 East, 124; *Bank of Australasia v. Nias*, 16 Q. B. 717; *Bank of Australasia v. Harding*, 19 L. J. C. P. 345; 9 C. B. 661; *Castrique v. Behrens*, 30 L. J. Q. B. 163; *Kelsall v. Marshall*, 1 C. B. N.S. 241.

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"did not merge or extinguish the plaintiff's simple contract debt, which can only be done by converting it into a debt of a higher nature; it is only evidence of the debt."

"If then," says Tindal, C.J., in *Smith v. Nicolls*, "the judgment has not altered the nature of the rights between the parties, it appears to me that the plaintiff has his option, either to resort to the original ground of action, or to bring an *assumpsit* on the judgment recovered." It was suggested as a moot point before the Judicature Acts (*a*), whether in cases where the plaintiff elected to sue on the original cause of action, it would not be open to the defendant to controvert the ground of action notwithstanding the production of the foreign judgment as evidence; on the same principle on which it has been held that where there is an opportunity of placing a domestic judgment on the record, and it is not placed there, it will not be conclusive (*b*). It is hardly probable that the point will arise under the new practice, as it is most unlikely that the statement of claim in such a case would be framed without setting out both the original cause of action and the foreign judgment; but should a foreign judgment be relied upon only as evidence, and not as an original cause of action, it is quite clear that it would at least be evidence, and strong *prima facie* evidence, of the obligation on which it was based. Speaking of the ordinary practice of suing on a judgment, Blackburn, J., says in *Godard v. Gray* (*c*): "The mode of pleading shews that the judgment was considered, not as merely *prima facie* evidence of that cause of action for which the judgment was given, but as in itself giving rise, at least *prima facie*, to a legal obligation to obey that judgment and pay the sum adjudged. This may seem a technical mode of dealing with the question; but in truth it goes to the root of the matter. For if the judgment were merely considered as evidence of the original cause of action, it

(*a*) *Doe v. Oliver*, 2 Sm. L. C. (n.) 813.

(*b*) *Vooght v. Winch*, 2 B. & Ald. 162; *Doe v. Huddart*, 2 C. M. & R. 316.

(*c*) I. R. 6 Q. B. 139, 150.

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judgment—
validity of.

must be open to meet it by any counter evidence negat- ing the existence of that original cause of action" (a).

The ordinary mode adopted in England of enforcing a foreign judgment being then to bring an action upon it, as creating a substantive legal obligation, it becomes important to consider what objections may be taken to its validity. Anything which negatives the existence of that legal obligation, or excuses the defendant from the performance of it, must form a good defence to the action. It must be open, therefore, to the defendant to shew that the Court which pronounced the judgment had not jurisdiction to pronounce it, either (a.) because they exceeded the jurisdiction given to them by the foreign law, or (b.) because he, the defendant, was not subject to that jurisdiction (b). That the foreign Court should have had jurisdiction in the first instance is the essential condition implied by Parke, B., in his enunciation of the principle on which foreign judgments are recognised here, cited above (c), and, indeed, hardly stands in need of authority to confirm it. But it is clearly not sufficient, in order to impeach a foreign judgment, to shew that the Court which pronounced it had no jurisdiction by its own rules, if it had jurisdiction according to the principles of international law over the person of the defendant and the subject-matter of the action (d). Thus a plea to an action on a judgment of the French Tribunal of Commerce, that the Court was not a Court of competent jurisdiction in that behalf, *according to the French law*, because the defendant was not a trader, and was not resident in a particular town when the cause of action arose, was held bad (e). It is obvious that these defences, being admittedly defences by the French law, should have been pleaded in the French Court, and it is well established that defences which might have been raised in the Court where the judgment

(a) See also *Phillips v. Hunter*, 2 H. Bl. 410; *Sinclair v. Fraser*, Doug. 5, n.; *Hall v. Odber*, 11 East, 124.

(b) *Godard v. Gray*, L. R. 6 Q. B. 149.

(c) *Russel v. Smyth*, 9 M. & W. 819; *Williams v. Jones*, 11 M. & W. 633.

(d) *Vanquelin v. Bouard*, 33 L. J. C. P. 78, 84; 15 C. B. N.S. 341.

(e) S.C.

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of tribunal
pronouncing
judgment.

was obtained, cannot be brought forward afterwards to impeach it (a). The rule that the person of the defendant must be properly subject to the jurisdiction has been put by modern cases in the clearest possible light.

In *Schibusby v. Westenholz* (b), it was held that a judgment of a foreign Court, obtained in default of appearance against a defendant, cannot be enforced in an English court, where the defendant, at the time the suit commenced, was not a subject of nor resident in the country in which the judgment was obtained; *for there existed nothing imposing any duty on the defendant to obey the judgment of the foreign Court*. "On this point," said Blackburn, J., delivering the opinion of the Court of Queen's Bench, "we think some things are quite clear on principle. If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them. If at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them, though before finally deciding this we should like to hear the question argued. But every one of these suppositions is negatived in the present case. Again, we think it clear, upon principle, that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him" (c). With regard to the last case put, of submission to the jurisdiction by electing to

(a) *Henderson v. Henderson*, 6 Q. B. 288; *Bank of Australasia v. Nias*, 16 Q. B. 717; *Ricardo v. Garcias*, 12 Cl. & F. 368; *Vanquelin v. Bouard*, 33 L. J. C. P. 78; 15 C. B. N.S. 311.

(b) L. R. 6 Q. B. 155.

(c) See to the same effect *per* Parke, B., in *General Steam Navigation Co. v. Guillou*, 11 M. & W. 877, 894.

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sue in its tribunals, it is obvious that a plaintiff who has made such a submission cannot be afterwards heard to complain of its acceptance; and it has been held that a foreigner, though not resident or present within the jurisdiction of a domestic tribunal, and without any actual notice or knowledge of its proceedings, may nevertheless be taken to have submitted to the jurisdiction as defendant by his previous conduct. In that case the replication alleged that the defendant was holder of shares in a French company, having its legal domicil at Paris, and became thereby subject, by the law of France, to all the liabilities belonging to holders of shares, and in particular to the conditions contained in the statutes or articles of association; that by these statutes it was agreed that all disputes arising during liquidation between shareholders should be submitted to the jurisdiction of the French Court; that every shareholder provoking a contest must elect a domicil, and in default election might be made for him at the office of the imperial procurator of the civil tribunal of the department in which the office of the company was situated, and that all summonses and notices should be validly served at the domicil formally or impliedly chosen; that the circumstances arose under which these statutes provided that it should be incumbent upon the defendant to elect a domicil as above, but that he never elected a domicil, and that the plaintiff therefore caused a summons in an action brought in the French court to be delivered for the defendant at the above-mentioned office: that this service was regular and amounted to notice by the law of France, and that, on default of appearance, judgment was recovered by default against the defendant. This replication was held good by the Court of Exchequer; though a similar replication in the same case, resting the defendant's submission merely upon his having become a member of a French company, and the provisions of the French law, omitting all reference to the statutes or articles of association, was held

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insufficient by a majority of the Court (*a*). The submission must clearly be deduced from the conduct of the person who is alleged to have submitted, and it would seem that this conduct should be something amounting to a contract or waiver. It is clearly not enough to shew that a defendant has entered into business transactions, or become a member of a company, within a foreign country. He is not supposed to know all the law of the foreign country, simply because he enters into commercial relations with it; nor, if he knows it, is he therefore to be regarded as having submitted to its authority. Similarly where a private colonial statute authorized an unincorporated banking company to sue and be sued in the name of its chairman, and provided that execution upon any judgment so obtained against the chairman might be executed upon the goods and chattels of the individual members, it was held that the individual members were bound by a judgment against the chairman obtained in conformity with the statute, although not within the jurisdiction of the colonial Court, nor served with any notice, summons, or process of the action against the chairman (*b*). The provisions of the local Act in this case, being the enactment by which the Bank was constituted, were clearly regarded, not as part of the general colonial law, but as the private regulations and constitutions of the Bank, to which all the members were assenting parties; and the decision is not an authority for the proposition that a person who becomes a member of a foreign company consents by implication to be governed by the general foreign law during his connection with it, though no doubt his submission to that law for certain purposes is complete (*c*). So in another case, the owner of shares in a French company, who was bound by French law to elect a domicil at which all notices of judicial pro-

(*a*) *Copin v. Adamson*, L. R. 9 Ex. 345.

(*b*) *Bank of Australasia v. Harding*, 9 C. B. 661; 19 L. J. C. P. 345.

(*c*) See per Amphlett, B., in *Copin v. Adamson*, L. R. 9 Ex. 345, 355.

ceedings might be left for him, complied with the French law by electing a domicil in the prescribed forms, and these facts were held without doubt to afford a good answer to a plea that the French judgment against him, on which the action was founded, was obtained during his absence from France, and without any notice to him of the proceedings in the French tribunal (*a*). If, in *Copin v. Adamson*, the defendant had shewn his knowledge of and acquiescence in the French law by a compliance with its provisions, it would not have been necessary, in order to bind him, to have referred to the statutes or articles of association of the company of which he was a member.

Next, it is now undisputed that a foreign judgment may be avoided by shewing that it was obtained by the fraud of the party setting it up (*b*). It would seem clear that on principle the obligation which arises out of a foreign judgment should be regarded as vitiated by that which with respect to all other obligations prevents a plaintiff from profiting by or insisting on the right which he has legally acquired. The point was recently distinctly raised before the Court of Appeal in Chancery, and it was put beyond doubt by the judgment of Lord Selborne, that the rule of equity and common law upon it was the same. "It has been suggested that there may be a doubt about the power of a Court of law to give full effect to the allegations of fraud contained in those portions of the bill which relate to the foreign judgment. I should be sorry to think that anything should fall from this Court which might give the least colour to any doubt as to the power of a Court of law to take cognizance of fraud in obtaining foreign judgments. . . . I say, therefore, without hesitation, that supposing the fraud to be one provable here, it could be pleaded at law, and would be a legal defence" (*c*). If, indeed, an English judgment is examinable for fraud, it would appear *à fortiori* that a foreign judgment must

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ment—may
be impeached
for fraud.

(a) *Vallée v. Dumergue*, 4 Ex. 290; 18 L. J. Ex. 398.

(b) *Godard v. Gray*, L. R. 6 Q. B. 139, *per* Blackburn, J., at p. 149.

(c) *Ochsenbein v. Papelier*, L. R. 8 Ch. 695.

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be so. A foreign judgment, like all other acts of judicial authority, must be impeachable from without; although it is not permitted to shew that the Court was mistaken, it may be shewn that it was misled. Fraud is an extrinsic collateral act which vitiates the most solemn proceedings of Courts of Justice. In the words of Lord Coke, it avoids all judicial acts, ecclesiastical or temporal (*a*). These authorities are so clear upon the point, that it is hardly necessary to recapitulate other decisions to the same effect, but it may be remarked that though Blackburn, J., speaks in far less positive language on the question in *Godard v. Gray* (*b*), no doubt is thereby thrown upon it, as the point was not argued or contested in that case, and there is abundance of authority to suggest the principles laid down above (*c*). The fraud alleged must not, however, be something which was virtually before the foreign Court, and decided by it (*d*).

**Foreign judgment—not
examinable for
error in law.**

Lastly, it is necessary to consider how far a foreign judgment is examinable on the merits. The foreign Court may have been mistaken in law, or in fact; and if mistaken in law, either in their interpretation of their own law, of English law, or of the law of some other country. It has been stated that a foreign judgment will be reviewed here, if based upon an erroneous interpretation either of private international law (*e*), or of English law (*f*); but the later decisions clearly shew that this is a misapprehension. There can be no difference, in the words of Blackburn, J., between a mistake made by a foreign Court as to English law, and any other mistake,

(*a*) *Per De Grey, C.J.*, in *Duchess of Kingston's Case*, 2 Sim. L. C. 7th ed. 760.

(*b*) L. R. 6 Q. B. 139, 149.

(*c*) See, in addition to the cases already cited, *Price v. Dewhurst*, 8 Sim. 279, 302, 304; *Bank of Australasia v. Nias*, 16 Q. B. 717, 785; *Cammell v. Sewell*, 3 H. & N. 617, 646; *Castrique v. Imrie*, L. R. 4 H. L. 414, 433; *Buller's N. P.* 244, *s*; *Story, Conflict of Laws*, §§ 603, 607, 608.

(*d*) *Castrique v. Behrens*, 30 L. J. Q. B. 168; *Westlake, Priv. Int. Law*, § 389, *infra*, p. 465.

(*e*) *Westlake, Priv. Int. Law*, § 388, citing *Reiniers v. Druce*, 23 Beav. 145, 156; *Arnott v. Redfern*, 2 C. & P. 88; *Felix*, 327, *n.*

(*f*) Sim. L. C. 7th ed. ii. 448; *Westlake Priv. Int. Law*, § 388, citing *Novelli v. Rossi*, 2 B. & Ad. 757.

unless it is to be said that a defence which is easily proved is to be admitted, but that one which would give the Court much trouble to investigate is to be rejected ; and accordingly, no foreign judgment can be impeached by shewing that it was wrongly arrived at. Nor does it make any difference that the error alleged appears on the face of the proceedings (a). The previous authorities, which had been construed by some writers as deciding that a foreign judgment will be invalidated by shewing that it was founded upon a mistaken view of English law, are collected and explained in the valuable judgment of Blackburn, J., in *Castrique v. Imrie* (b), delivering the opinion of five of the judges. After stating that fraud would vitiate any obligation, even the obligation imposed by a foreign contract, that there was nothing equivalent to fraud in the case before the Court, and that all that was required of a tribunal that had to decide on a question of foreign law was that it receive and consider the evidence as to the foreign law, and *bona fide* determine on that as well as it can, the learned judge proceeded as follows :—“ Various cases were cited as authorities that where a foreign Court has mistaken or misapplied the English law, the Courts of this country will not regard the foreign judgment; but we think they do not bear out any such general position. One class of cases—such as *Pollard v. Bell* (c), *Bird v. Appleton* (d), *Dagleish v. Hodgson* (e), and others—proceed on a principle not applicable to the present case. A judgment in an English Court is not conclusive as to anything but the point decided, and therefore a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forgery in an action on the bill, though the conviction must have proceeded on the ground that the bill was forged. But very early in insurance

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*Castrique v.
Imrie*—judg-
ment in.

(a) *Godard v. Gray*, L. R. 6 Q. B. 151, 152.

(b) L. R. 4 H. L. 414.

(c) 8 T. R. 434.

(d) 8 T. R. 562.

(e) 7 Bing. 495.

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cases a practice began of treating the judgment of a Prize Court condemning a vessel as being the property of an enemy as not only conclusive evidence that the vessel was condemned, which of course it was, but also as conclusive evidence that the vessel was not neutral. There are many cases which proceed on the principle that where it can be made to appear that the judgment of the Prize Court did not proceed on the ground that the vessel was an enemy's property, it cannot be conclusive evidence that it was not neutral. In *Lothian v. Henderson* (a), the judgment of the House of Lords was that in a policy on a ship, warranted neutral, a stipulation, that a condemnation should not be conclusive evidence that the vessel was not neutral, was effectual. Lord Eldon, in delivering that judgment, expresses a strong opinion that the practice of receiving the sentences of Prize Courts as conclusive of the collateral matter was originally a mistake. And he also intimates an opinion that the cases just alluded to were attempts to graft a vicious exception on a rule originally vicious, but now become law. It is unnecessary to form or express any opinion on these cases, further than that they proceed on a principle that has no bearing on the present question.

"*Novelli v. Rossi* (b), which was relied on, also proceeds on a principle not at all applicable to the present case. It is clear that no judgment of a foreign Court can have any effect unless the subject-matter of the decision (whether *inter partes* or *in rem*) is within the lawful control of the State whose tribunal has pronounced the judgment. In *Novelli v. Rossi*, a Frenchman had, at Lyons, drawn a bill on an Englishman in London. The defendant had, at Manchester, indorsed it to the plaintiff. Afterwards the defendant instituted a suit in France to have it declared that he and all prior parties were discharged from their obligations on the bill on account of a cancellation of the acceptance in London by mistake; and, notwithstanding the opposition of the plaintiff, the

(a) 3 B. & P. 499, at p. 545.

(b) 2 B. & Ad. 757.

French Court, on a mistaken view of the English law, pronounced a judgment to that effect. But though the French tribunals had jurisdiction to declare that no one should sue on the bill in their Courts, they had none to determine that the plaintiff should not sue in an English Court on an English contract. If they had taken a correct view of the English law there would have been a defence, because such was the English law, not because the French Court had so decided. Being wrong, there was no defence, not because the French Court made a mistake, but because it had no jurisdiction.

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"The same principle will, we believe, be found to lie at the bottom of those cases in which our Courts have refused to enforce judgments obtained in a foreign country against a person not resident in that country, and who had no notice of the suit, such as *Buchanan v. Rucker* (*a*). It may very well be held that the foreign country has no jurisdiction to pronounce judgment against a person behind his back who is not subject to its jurisdiction; but it is unnecessary to examine these cases; for in the present one the ship concerned was clearly within the jurisdiction of the Empire of France; and the plaintiff had notice, and was heard, though unluckily the French Court made a mistake.

"*Simpson v. Fogo* (*b*) was also cited, but that case proceeded on a principle very different from any applicable to the present case. There a creditor of Messrs. K., the owners of a British ship, obtained in Louisiana a judgment against them, under which their interest in the ship, and no more, was sold under a process exactly analogous to our *fieri facias*. There could be no doubt, if that had been all, that the Bank of Liverpool, which held a valid mortgage on the ship, might have taken possession of it as against the purchasers just as much as against the judgment debtors, K. & Co. But the bankers in Liverpool had in Louisiana intervened and endeavoured to

(*a*) 9 East, 192.

(*b*) 29 L. J. Ch. 657; 32 L. J. Ch. 249; 1 H. & M. 195.

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prevent the sale of their ship, and a judgment was pronounced against them, on the ground that the Courts in Louisiana wholly disregarded all rights acquired in England on an English ship, unless they were acquired in such a manner as to be valid in Louisiana. The contention before the Vice-Chancellor was that the purchaser of the ship and the bankers in Liverpool were privies to their judgment, and that, therefore, the purchaser was entitled to use it as an estoppel to preclude the bankers from setting up in an English Court their English right, though the judgment proceeded on the ground that the English right was to be wholly disregarded. The Vice-Chancellor decided otherwise. We should be sorry to cast any doubt on a decision which *prima facie* seems to carry out justice and good sense; but all that it is necessary to say in the present case, and therefore all that we do say, is that no such point here arises. The judgment of the French Court decreeing the sale of the vessel was not, according to the view of the facts which we take, a judgment that only the interest of C., if any, in the ship should be sold, but that the particular ship itself should be sold. And finding no authority for saying that the purchaser, under the decree of a foreign Court having competent jurisdiction to decree the transfer, is to be responsible for any mistakes made by that Court either in law or fact, we think we ought to act on the reason given in *Hughes v. Cornelius* (a): 'We must not set them at large again, for otherwise the merchants would be in a pleasant condition.' In truth, the plaintiff asks an English Court to sit as a Court of Appeal from the French Court, which is not the province of an English Court" (b).

Foreign judgment—error in law of Court pronouncing it.

The principles laid down in *Castrique v. Imrie* (c) have been in no sense questioned, but in a more recent judgment the Common Pleas Division have held that there is one case where an error in law committed by a foreign

(a) 2 Show. 232; 2 Sm. L. C. 830.

(b) *Castrique v. Imrie*, L. R. 4 H. L. (1870) 434-437.

(c) L. R. 4 H. L. 434.

Court may be corrected. The case referred to is where both parties admit that the foreign Court has wrongly interpreted its own law (*a*). Where such an admission is made, either on the pleadings, special case, or otherwise, the Common Pleas Division held that there was no rule of comity and no principle on which they were called upon to give effect to the foreign judgment; though strangely enough, Archibald, J., in delivering the decision referred to, expressed a doubt whether *Castrique v. Imrie* would not have compelled the Court to give effect to the foreign decree, if the mistake admitted had been a mistake in the law, not of the country to which the foreign tribunal belonged, but of a third distinct jurisdiction (*b*). The correctness of *Meyer v. Ralli* can only rest upon the exceptional circumstance that the error of the foreign Court was admitted upon the special case before the Common Pleas Division (*c*). The grounds and correctness of the foreign judgment were therefore not examined, nor is the case an authority for the proposition that they are examinable. It may be added that the French judgment impeached appears to have had the additional defect of having been founded on proceedings commenced without any actual summons served or notice in fact given to the defendants; nor does it clearly appear how far service of the summons at the bar of the Procureur Impérial was so warranted by the position of the parties as to amount to constructive notice (*d*).

It may, therefore, be assumed from the enunciation of the law by Blackburn, J., in *Castrique v. Imrie* (*e*), that the judgment of a foreign Court, if final (*f*), is examinable for no error or mistake, except a mistake by which it gave itself jurisdiction, although by the principles of

(*a*) *Meyer v. Ralli*, L. R. 1 C. P. D. 358.

(*b*) *Ibid.* pp. 370, 371.

(*c*) *Scott v. Pilkington*, 2 B. & S. 11, 41; *Bank of Australasia v. Nias*, 16 Q. B. 717; *Ricardo v. Garcias*, 12 Cl. & F. 368; *Castrique v. Imrie*, L. R. 4 H. L. 434.

(*d*) *Infrà*, p. 458.

(*e*) *Ante*, p. 451.
(*f*) *Frayes v. Worms*, 10 C. B. N.S. 149; *Plummer v. Woodburne*, 4 B. & C. 625.

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Foreign judg-
ment—incon-
sistent with
natural
justice.

private international law, it would have had none. The earlier *dicta* (*a*) to the effect that a foreign judgment will be reviewed for any error in private international law, or for any violation of natural justice, would seem, upon examination of the authorities, strictly applicable only to this point. An error in jurisdiction is the only error which a foreign Court is allowed to detect and set right (*b*). The strongest modern decisions in favour of the theory that no foreign judgment manifestly opposed to natural justice is to be enforced by an English Court, are all of earlier date than *Castrique v. Imrie*, and must be taken subject to the principles followed in that case. The condition, indeed, on which a foreign judgment shall be accepted here, as stated by Lord Ellenborough in *Buchanan v. Rucker* (*c*), namely, that it should appear on the face of it consistent with reason and justice, is said by Blackburn, J., in *Schisby v. Westenholz*, to be mere declamation. It may be remarked, however, that in the case of *Liverpool Marine Credit Company v. Hunter* (*d*), which was not referred to or cited in *Castrique v. Imrie*, it was intimated by Lord Chelmsford that when there had been a "total disregard of the comity of nations," an English Court would be justified in disregarding a judgment "so fraught with injustice"; and similar expressions were used by Lord Hatherley in the same case in the Court of first instance: "If in examining a judgment, as we are at liberty to do, we find on the face of it that a course of procedure has been adopted which is inconsistent with natural justice, then this Court will not give effect to the decisions and to the authority which it would otherwise be perfectly willing to recognise." This is no doubt strong

(*a*) Sm. L. C. ii. 448; *Westlake*, § 388.

(*b*) The fact, however, that a foreign judgment has been obtained without due notice to the defendant is equivalent to a wrongful assumption of jurisdiction. See the observations of Blackburn, J., upon *Buchanan v. Rucker*, in *Castrique v. Imrie*, *ante*, p. 453; *Ferguson v. Mahon*, 11 A. & E. 179; *Reynolds v. Fenton*, 3 C. B. 187; *Copin v. Adamson*, L. R. 9 Ex. 345; *Schisby v. Westenholz*, L. R. 6 Q. B. 155, *ante*, p. 459.

(*c*) *Buchanan v. Rucker*, 1 Camp. 63; S.C. 9 East, 192; *Schisby v. Westenholz*, L. R. 6 Q. B. 155, 160.

(*d*) L. R. 3 Ch. 479, 484; S.C. L. R. 4 Eq. 62.

language, but the very next paragraph shews what was in Lord Hatherley's mind, and that his view can really be reconciled with the theory of foreign judgments already deduced from *Castrique v. Imrie*. "It sometimes happens, for instance, that foreign Courts proceed to judgment in the absence of the party against whom proceedings are taken, or after inadequate notice of trial" (a). It is plain that this could only have been said in contemplation of such cases as *Buchanan v. Rucker* (b), as to which it was expressly said in *Castrique v. Imrie* that the judgment of a foreign Court could be reviewed, not because it had made a mistake in law, but because it had acted without jurisdiction (c). It may be added in conclusion on this part of the subject, that although it is necessary that the foreign Court should have had jurisdiction, it is not necessary, in suing on a foreign judgment, to allege that this requisite has been complied with (d).

Closely akin to the question of jurisdiction, with regard to which it has thus been shewn that a foreign judgment has been declared by a *consensus* of authorities to be examinable, is that of *notice to the defendant*. The fact that no notice, or no sufficient notice, was given to the defendant of the proceedings on which the judgment was founded, may be an incident, of course, of the want of jurisdiction referred to, or an element of fraud—the presence of fraud being, as has been stated, sufficient of itself to deprive a judgment so obtained of all validity. Thus, if a defendant is not resident in nor a subject of a foreign country, nor present within its territorial limits, and has no notice of an action brought against him in its tribunals, it is plain that the absence of notice is merged, so to speak, in the absence of jurisdiction, which would be amply sufficient to

(a) *Liverpool Marine Credit Co. v. Hunter*, L. R. 4 Eq. 62, 68.

(b) 9 East, 192; *ante*, p. 453.

(c) On this subject cf. also the judgment of the Exchequer Chamber in *Cammell v. Sewell*, 5 H. & N. 728; other cases in point are *Cavan v. Stewart*, 1 Stark. 525; *Obicini v. Bligh*, 8 Bing. 335; *Frankland v. M'Gusty*, 1 Knapp, 274; *Baring v. Clagett*, 3 B. & B. 215; *Pollard v. Bell*, 8 T. R. 444; *Bolton v. Gladstone*, 2 Taunt. 85; *Price v. Dewhurst*, 8 Sim. 279; *Paul v. Roy*, 15 Beav. 440.

(d) *Robertson v. Struth*, 5 Q. B. 941; *Barber v. Lamb*, 8 C. B. N.S. 95.

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invalidate the judgment, even if notice was in fact given. But if a defendant is subject to the foreign jurisdiction, either by domicil or submission, and according to the older opinions, even by nationality, he is of course subject to its laws; and though he has no *actual* notice of an action commenced against him in its tribunals, and may not have been served with any writ or process, he may have had *constructive* notice which will satisfy those laws, and be accepted by foreign tribunals as sufficient. If those laws, for instance, provide that notice may be effected on an absent defendant by nailing a copy of the declaration on the Court-house door (*a*), or by service at the office of a public officer (*b*), or by any other notice in law which cannot be said to be notice in fact, those who are properly subject to those laws will be bound by them, and no other; for, as Lord Ellenborough said in *Buchanan v. Rucker*, they can never be intended for or applied to persons who, for aught that appears, were never present within or subject to the jurisdiction. This subjection or submission to the jurisdiction, as has been already implied, does not depend solely upon the domicil or residence of the defendant, but may be inferred from his acts, where they shew an intention to submit, for the purposes of a particular transaction, to the foreign law and the methods of service which it adopts. Such a submission has been implied where a person has joined a foreign company, the statutes or articles of association of which contained special provisions authorizing constructive notice of process or action by something which would not or might not be notice in fact (*c*): but it appears not to be sufficient that the law of the country to which the foreign company belongs should contain such provisions, if the rules or articles of the company itself do not repeat or adopt them (*d*). So, the acceptor

(*a*) *Buchanan v. Rucker*, 1 East, 192.

(*b*) *Schibby v. Westenhols*, L. R. 6 Q. B. 155.

(*c*) *Copin v. Adamson*, L. R. 9 Ex. 345; *Bank of Australasia v. Harding*, 9 C. B. 661; 19 L. J. C. P. 345; *Vallée v. Dumerque*, 4 Ex. 290; 28 L. J. Ex. 398.

(*d*) *Per Amphlett and Pigott*, BB. (Kelly, C.B., dissentiente), in *Copin v. Adamson*.

in a foreign country of a bill drawn and payable there, though not subject to the jurisdiction by domicil, nationality, or residence, was held to have submitted himself to it in an action on the bill itself, so as to be bound by a judgment obtained in the foreign tribunal without actual notice or service to the defendant, but in compliance with the requirements of the foreign law as to service and notice (*a*). In the more recent case of *Schibbsby v. Westenholtz* (*b*), which has been already referred to, a foreign judgment was held invalid on the ground that the defendants were not subject to the jurisdiction by residence, transient presence, or any other reason, and that therefore existed nothing which imposed upon them any duty to obey the obligation which the judgment created. In that case, though no personal service of process or summons had been effected on the defendants, notice had been in fact received by the defendants through the French consul in the country where the defendant resided, service having been effected in accordance with the French law at the office of the Procureur Impérial. The defendants had, therefore, notice of process in the eye of the foreign law, and notice in fact; but they were not subject to the jurisdiction, and therefore the question of notice became immaterial, as there was no foundation for the action at all. In *Reynolds v. Fenton* (*c*), a plea alleging that the defendant had received no formal notice, by service of process or otherwise, of the action, was held bad; but in that case it was not alleged that the defendant was not subject, by domicil or otherwise, to the jurisdiction, or even that he had not in fact knowledge and notice of the proceedings. The *dicta*, therefore, to be found in the course of the argument to the effect that the question for the Court was whether the judgment was obtained contrary to natural justice, and that this was not shewn by the plea, are sufficiently justified by the meagre-

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Jurisdiction
and notice to
defendant.

- (*a*) *Meus v. Thellusson*, 8 Ex. 638.
- (*b*) L. R. 6 Q. B. 155; *Godard v. Gray*, ib. p. 189.
- (*c*) 3 C. B. 187.

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ness of its allegations. It is true that in *Ferguson v. Mahon* (*a*), decided before the case last cited, a similar plea was held good, the judgment sued on being an Irish one, but there the question of jurisdiction by general subjection does not appear to have been disputed or suggested to the Court, the sole point being whether the Irish proceedings were regular. Lord Denman said that the question was whether the judgment passed under such circumstances as to shew that the Court had properly jurisdiction over the party; and when it appeared that the defendant had never received notice of the proceeding, or been before the Court, it was impossible to allow the judgment to be made the foundation of an action in England. It will be observed that in this case the plea was construed as amounting to an allegation that the defendant had neither received notice in fact of the proceedings, nor constructive notice according to the regulations of a law to which he was properly subject, and the decision must not be viewed as any authority for supposing that knowledge or notice in fact are absolutely necessary, if the defendant is subject or has submitted himself to the local law, and that local law provides a substitute or equivalent for such knowledge or notice. This subjection is, in fact, the test of jurisdiction in the eye of the English law; which, as pointed out by Westlake (*b*), recognises the competence of the *forum rei*, certainly by domicil or residence, if not by allegiance also (*c*).

It has thus been seen that error in law, whether domestic, foreign, or international, is not in itself a ground on which a judgment can be reviewed in a foreign court, unless such error involve an assumption of jurisdiction in violation of ordinary international principles, or the Court pronouncing the judgment has proceeded without due notice against a party who is neither bound nor has con-

(*a*) 11 A. & E. 179. See also *Cowan v. Braidwood*, 1 M. & G. 882; 2 Scott, N. R. 138; *Douglas v. Forrest*, 4 Bing. 686; *Smith v. Nicolls*, 5 N. C. 208; 7 Scott, 147; *Guinness v. Carroll*, 1 B. & Ad. 459.

(*b*) *Priv. Int. Law*, § 380.

(*c*) *Douglas v. Forrest*, 4 Bing. 686, 703.

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Error in fact.

sented to accept any substitute for notice in fact which the Court may have deemed sufficient. So far as these requirements are based upon natural justice, the *dicta* that a foreign judgment contrary to natural justice cannot be recognised may be supported, but there seems no ground for extending them further. Error in law having thus been disposed of, error in fact, as a ground for impeaching a foreign judgment, must next be considered; and as to this it may be said shortly that a foreign judgment, both in respect of the issues of fact found and the grounds on which the findings were arrived at, is now admitted to be conclusive (a). On this point, however, there has long been a conflict of opinion, and the question has in fact been so involved with the alleged right to examine foreign judgments on other grounds, which has just been discussed, that it is not easy to distinguish the decisions strictly applicable to it. The authorities in opposition to the now accepted opinion, that a foreign judgment is conclusive as to the facts on which it pronounces, will first be recapitulated.

Foreign judg-
ment—when
examinable.

It was stated by Eyre, C.J., in *Phillips v. Hunter* (b), that a foreign judgment, though it cannot be examined under ordinary circumstances by an English Court, yet it is so examinable when the party who claims the benefit of it applies to an English Court to enforce it; and that under such circumstances it is treated as matter in *pais*, as consideration *prima facie* sufficient to raise a promise. It may be pointed out at once, however, that this distinction has received no modern recognition, and that the theory of a foreign judgment being merely *prima facie* evidence of a promise supported by consideration, is now exploded. "It is difficult to understand," says Blackburn, J., "how the common course of pleading is consistent with any notion that the judgment was only evidence. If that were so, every count on a foreign judgment must be demurrable on that ground. The mode of

(a) *Godard v. Gray*, L. R. 6 Q. B. 189, 149, and *infra*.

(b) 2 H. Bl. 410.

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pleading shews that the judgment was considered, not as merely *prima facie* evidence of that cause of action for which the judgment was given, but as in itself giving rise, at least *prima facie*, to a legal obligation to obey that judgment and pay the sum adjudged. This may seem a technical mode of dealing with the question, but in truth it goes to the root of the matter. For if the judgment were merely considered as evidence of the original cause of action, it must be open to meet it by any counter evidence negativing the existence of that original cause of action" (a).

In *Houlditch v. Donegal* (b), which is perhaps the strongest authority in favour of the liability of foreign judgments to review, Lord Brougham expressed his opinion in very plain terms that a foreign judgment may be given in evidence, and made the subject of proceedings in another court or country, but that "it may be met by contrary evidence, and the subject-matter of the judgment is liable to be inquired into . . . In my judgment it has always hitherto been recognised in Westminster Hall that the judgments of foreign Courts are traversable, may be averred against, and are only *prima facie* evidence in actions to support which they are given in evidence" (c). The language of the same learned judge in *Don v. Lippman* (d) is in effect to the same purpose, inasmuch as he there cites authorities to shew that English Courts regard a foreign judgment only as *prima facie* evidence of a debt; and in *Houlditch v. Donegal* other authorities were referred to, shewing that the opinions of Lord Mansfield, Buller and Bayley, JJ. (e), coincided with the view he then took of the subject. In *Galbraith v. Neville* a resolution of the House of Lords was cited, which declared

(a) *Godard v. Gray*, L. R. 6 Q. B. 139, 149.

(b) 8 Bligh, N. R. 301.

(c) 8 Bligh, N. R. pp. 346, 340. This judgment is cited, though it must be regarded as overruled, in consequence of a misapprehension with respect to it in Westlake, § 385. The language quoted cannot certainly be regarded as "doubtful."

(d) 5 Cl. & F. 1, 20, 21, citing *Fraser v. Sinclair*, Morr. 4543.

(e) *Walker v. Witter*, 1 Dougl. 1; *Galbraith v. Neville*, 1 Dougl. 5; *Tarleton v. Tarleton*, 4 M. & S. 20.

that a judgment of the Supreme Court of Jamaica ought to be received as evidence, *prima facie*, of the debt for which it had been given, and that it lay upon the defendant to impeach the justice thereof, or to shew the same to have been irregularly or unduly obtained (a). This *dictum* was expressly followed by Best, C.J., in *Arnott v. Redfern*, but, as is pointed out in the note to the *Duchess of Kingston's Case*, by the authors of Smith's Leading Cases, it was only adopted to the extent of admitting a foreign judgment as at all events *prima facie* evidence (b). The point there was not whether a foreign judgment could be contradicted on a question of fact, but whether, if uncontradicted, it was sufficient to establish a cause of action.

The foregoing are the principal authorities to be found for the theory, now undoubtedly exploded, that foreign judgments, properly obtained, are *prima facie* evidence only of the facts to which they relate. There are, on the other hand, abundant contemporaneous *dicta* in favour of regarding them as conclusive, which recent authorities render it unnecessary to examine in detail (c). In 1845 it was stated by Lord Campbell in the House of Lords that at common law, foreign judgments, between the same parties and on the same matters, were evidence only, but that they had been held to be conclusive in a Chancery case by Vice-Chancellor Shadwell (d). The cause then before the House of Lords was an appeal from the same judge, but Lord Campbell in his judgment drew no distinction between common law and equity on this question. "A foreign judgment," he says, "may be pleaded as *res judicata*, because the foreign tribunal has clearly jurisdic-

Foreign judg-
ment—con-
clusive as
to facts.

(a) H. L. 4th March, 1871, cited in the *Duchess of Kingston's Case*, 11 Harg. St. Tr. 122; see also *per* Lord Mansfield in *Moses v. Macfarlane*, 2 Burr. 1005.

(b) Sm. L. C. ii. 822 (7th ed.)

(c) *Boucher v. Lawson*, Ca. temp. Hardwicke, 89; *Kennedy v. Cassilis*, 2 Swanst. 326, n.; *Galbraith v. Neville*, 1 Dougl. 5 (*per* Lord Kenyon); *Tarleton v. Tarleton*, 4 M. & S. 21 (*per* Lord Ellenborough); *Martin v. Nicolls*, 3 Sim. 458; *Smith v. Nicolls*, 5 Bing. N. O. 221; *Ferguson v. Mahon*, 11 A. & E. 179.

(d) *Ricardo v. Garoias*, 12 Cl. & F. 368, 384, 401; *Martin v. Nicolls*, 3 Sim. 458.

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tion over the matter ; and both parties having been regularly brought before the foreign tribunal, and that tribunal having adjudged between them, I think that such a judgment would be a bar to a subsequent suit in this country for the same cause." In this judgment a sounder distinction than that between equity and common law is in fact indicated. There is an important difference between the position of a plaintiff who seeks by action to enforce a judgment which he has obtained from a foreign tribunal, and that of a defendant who claims the protection here of a foreign judgment already given in his favour. In the latter case, as Story points out, the party who has been defeated abroad, after a fair hearing by a competent Court, has no right to institute a new suit elsewhere, and thus to bring the matter again into controversy. The other party is not to lose the protection which the foreign judgment gave him (a). Accordingly it was held, in more than one case, even by those who most strenuously urged the liability of foreign judgments to review when a plaintiff sought to enforce them here, that they were absolutely conclusive, as to the facts involved in them and the grounds on which they rested, when pleaded in bar (b). The state of the law with reference to this distinction was clearly expressed by Lord Romilly in 1857 : "In the numerous authorities that bear on this subject, a distinction is also taken between the cases where the foreign judgment is brought before the cognizance of an English Court upon an application by the successful party to enforce and obtain the fruits of it against the defendant, and those cases where the defendant here sets up the foreign judgment, as a bar to the proceedings instituted by the person who has failed against the same defendant, with reference to the same subject-matter. In *Phillips v. Hunter*, Eyre, C.J., considered that distinction to rest upon

(a) Story, Conflict of Laws, § 598.

(b) *Burrows v. Jemino*, 2 Str. 733, cited Cas. temp. Hardwicke, 87; *Boucher v. Lawson*, Cas. temp. Hardwicke, 80; *Tarleton v. Tarleton*, 4 M. & S. 20; and see especially *per* Eyre, C.J., in *Phillips v. Hunter*, 2 H. Bl. 402, 410.

this principle: that as, in the former case, the judgment is submitted voluntarily to the Court, the question arises, whether it is sufficient as a consideration to raise a promise, and that thereupon it must be examined as all other considerations for promises are examined, and that evidence of the foreign law is admissible to shew that the judgment was or was not warranted; but that it is otherwise in the case of a defence; that the party living abroad is not entitled to sue the successful defendant again in another country, for the same subject-matter, but that the protection of a foreign judgment is complete everywhere, as well as in the place where it was pronounced. This distinction has certainly not been carried out to the extent laid down by Eyre, C.J.; still it is a distinction which has so much authority to support it, that it must be regarded, at least to some extent, in considering the value of a foreign judgment here" (a).

So far as regards the liability of a foreign judgment for review on the facts, it has been already intimated that this distinction need no longer be regarded. In *Henderson v. Henderson* (b), it was clearly laid down by Lord Denman that the principle of English law which assumed the judgment of a foreign Court to be in accordance with justice, "steered clear of an inquiry into the merits of the case upon the facts found; for whatever constituted a defence in that court ought to have been pleaded there." Judgment was accordingly given for the plaintiff, who was suing on a judgment obtained in Newfoundland, and had demurred to the defendant's pleas alleging that the case there had been wrongly decided upon the facts. So in 1854, in *Bank of Australasia v. Nias* (c), which was an action brought to enforce a colonial judgment, the defendant pleaded certain pleas denying the promises upon which the original action was brought, and also alleging that these promises were obtained by the fraud and covin

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(a) *Reimers v. Druce*, 23 Beav. 149, 150, per Lord Romilly, M.R.

(b) 6 Q. B. 288, 298 (1844).

(c) 16 Q. B. 717, 736; and see *Bank of Australasia v. Harding*, 9 C. B. 661.

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of the plaintiffs. It was held by Lord Campbell, delivering the judgment of the Queen's Bench, that these pleas were bad, and that the facts alleged by them were not to be re-tried in an English Court. "The pleas demurred to," said the Chief Justice, "must now be taken to have been in due manner decided against the defendant. . . . It seems contrary to principle and expediency for the same questions to be again submitted to a jury in this country." Nor is the fact that the judgment on which the action was brought was a colonial judgment, subject to review by the Judicial Committee of the Privy Council, of any importance with regard to the decision on this point. It is suggested by the judgment that there are even greater difficulties in the way of impeaching the competence or integrity of a colonial Court than of a foreign one from which no appeal lay to a British Court; but this refers rather to cases where want of jurisdiction or fraud is imputed, and not to those where it is sought to re-try a question of fact already settled by a foreign tribunal; nor has any such distinction as that suggested between a judgment obtained in a British colony, and a foreign judgment proper, been recognised in modern cases.

On the authorities above cited, the question whether a foreign judgment can be impeached as erroneous upon the merits came before the Court of Exchequer in 1861, the plaintiff, as in most of the cases, bringing his action on the judgment which it was sought to review, but it was held that the question was no longer open (*a*). It was suggested by Martin, B., in that case that, though the Courts of first instance were concluded by the authorities, the point might possibly be reconsidered in a court of error, but that course was not adopted; and in *Godard v. Gray* (*b*) the present law on the subject was laid down by Blackburn, J., in even less equivocal terms. "The decisions seem to us to leave it no longer open to contend, unless in a court of error, that a foreign judgment can be

(*a*) *De Coise Brissac v. Rathbone*, 6 H. & N. 301; 30 L. J. Ex. 238.

(*b*) L. R. 6 Q. B. 139, 150.

impeached on the ground that it was erroneous on the merits, or to set up as a defence to an action on it, that the tribunal mistook either the facts or the law. The defendant can no more set up as an excuse, that the judgment proceeded on a mistake as to English law, than he could set up as an excuse that there had been a mistake as to the law of some third country incidentally involved, or as to any other question of fact."

The earlier theory, therefore, indicated in *Phillips v. Hunter* (a) and other cases, that a foreign judgment was examinable when it was sought to enforce it, but conclusive when a defendant sought its protection, and the distinction between these two modes of bringing such a judgment into question, may be regarded as having given way to this simpler principle; that a foreign judgment is not examinable at all in either of these two cases, except where it is sought to prove a wrongful assumption of jurisdiction by the tribunal which pronounced it, or a procedure without notice to the person affected by it—the required notice being not necessarily notice in fact, if the defendant is bound or has consented or submitted to accept anything less as a substitute. It will be seen that this degree of validity was given from the first to judgments relied on by way of defence; and it would appear from the more recent cases, which have been cited above, that a foreign judgment when made a ground of action is entitled to equal respect.

The cases hitherto mentioned have been either instances of a plaintiff successful abroad, attempting to enforce his judgment here, or of a defendant, successful abroad, attempting to use the foreign judgment in his favour as a protection. The case may be supposed, however, of a plaintiff who has obtained a foreign judgment in his favour, but for a less amount than he conceives to be due to him, and who therefore claims to sue in an English Court upon his original cause of action. That he can sue upon his

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ness of foreign
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original cause of action has been already stated, inasmuch as there is no merger of such original cause in a foreign judgment (*a*), but the judgment, if *satisfied*, may nevertheless be pleaded in bar of the claim as a satisfaction (*b*). It may be more correct to say that in such a case the amount actually paid in accordance with the foreign judgment may be pleaded as payment, the plaintiff being estopped by the judgment itself from shewing that more was in fact due. Unless such an estoppel arose, the plea would of course be defeated by shewing a claim for a larger amount, on the principle that payment of part is no satisfaction of the whole (*c*). The position of the parties is in fact analogous to that occupied by plaintiff and defendant who have chosen to refer their differences to arbitration. Where a party has obtained the decision of an arbitrator in his favour, and his adversary has paid the amount, it would be manifestly contrary to reason and justice to allow the successful party to endeavour to obtain a better judgment in respect of the same subject-matter from some other tribunal (*d*).

(ii.) *Foreign Judgments in rem.*

Judgments
in rem con-
clusive as
against
strangers.

The consideration of the present subject has hitherto been confined to foreign judgments against the person, which are of course, notwithstanding some ambiguous expressions to the contrary (*e*), only entitled to recognition as creating an obligation in proceedings between the same parties or privies. Where the litigants are not the same, such a judgment is plainly *res inter alios acta*, and is not, except under very special circumstances, admissible

(*a*) *Smith v. Nicolls*, 5 Bing. N. C. 208; *Hall v. Odber*, 11 East, 124; *Kelsall v. Marshall*, 1 C. B. N.S. 241; *Castrique v. Behrens*, 30 L. J. Q. B. 163; *Barber v. Lamb*, 8 C. B. N.S. 95.

(*b*) *Barber v. Lamb*, 8 C. B. N.S. 95.

(*c*) *Cumber v. Wane*, 1 Sm. L. C. 341, and cases there cited.

(*d*) *Per Erle*, C.J., 8 C. B. N.S. 100.

(*e*) *Tarleton v. Tarleton*, 4 M. & S. 21; *Houlditch v. Donegal*, 8 Bligh, N. R. 301, 341.

in evidence at all (*a*). There is, however, another class of judgments which is entitled to wider recognition, though it may be sometimes difficult to decide to which class a particular judgment belongs. A judgment *in rem*, or a decree which changes or settles the ownership of immovable or movable property, is, subject to certain conditions as to the jurisdiction of the Court, conclusive not only against the parties to the original action, but as against all the world (*b*). That the principle which allows a foreign judgment to be impeached for fraud (*c*) applies to judgments *in rem* with the same certainty as to judgments *in personam* is of course indisputable (*d*) ; but in the absence of fraud, the only requisite necessary to the validity and conclusiveness of a foreign judgment *in rem* is that it should have been pronounced by a competent Court having actual jurisdiction over the subject-matter (*e*). The necessity of jurisdiction as a foundation for every judicial act has already been laid down with respect to judgments generally ; it being indispensable, adopting the words of Story (*f*), to establish that the Court pronouncing the judgment should have had lawful jurisdiction over the cause, over the thing, and over the parties. In ordinary actions and judgments *in personam* the necessity of jurisdiction over any particular thing does not arise. The decision of a tribunal between two parties, in personal actions, though in general binding between parties and privies, does not affect the rights of third parties. If in execution of the judgment in such an action process issues against the property of one of the litigants, and some particular thing is sold as being his property, the rights of third persons are in no way affected. The tri-

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(*a*) *Castrique v. Imrie*, L. R. 4 H. L. 427. For estoppel through privies in blood, law, or estate, by judgments, see note to *Duchess of Kingston's Case*, 2 Sm. L. C. 793 (7th ed.)

(*b*) *Per Blackburn, J., Castrique v. Imrie*, L. R. 4 H. L. 414.

(*c*) *Ante*, p. 449; *Ochsenbein v. Papelier*, L. R. 8 Ch. 695.

(*d*) *Shand v. Du Boisson*, L. R. 18 Eq. 283; *Messina v. Petrococchino*, L. R. 4 P. C. 144, 157.

(*e*) *The Flad Oyen*, 8 T. R. 270; *Havelock v. Rockwood*, 8 T. R. 276; *Donaldson v. Thompson*, 1 Camp. 429; *Oddy v. Botil*, 7 T. R. 523.

(*f*) § 586.

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**Judgments
in rem—
adjudication
on ownership.**

bunal had neither jurisdiction to determine, nor did it determine, anything more than that the litigant's property should be sold, and it does not do more than sell his interest, if any, in the property seized in execution. It is constantly seen in the English Common Law Courts, that where the sheriff has seized and sold a particular chattel under a *fieri facias* against A., B. may set up a claim to that chattel, notwithstanding the sale, either against the sheriff or the purchaser from the sheriff. And if this may be done in the courts of the country where the judgment was pronounced, it follows of course that it may be done in a foreign country (a). But when the tribunal has jurisdiction to determine not merely on the rights of the parties, but also on the disposition of a particular thing, and does in the exercise of that jurisdiction direct that the thing itself, and not merely the interest of any particular person in it, be sold and transferred, the case is very different (b). In such a case, the judgment is not *in personam*, but *in rem*; and its adjudication on the *status* or ownership of that thing is, as has just been said, conclusive against all the world, binding "in all courts, and against all persons" (c). Such a judgment is not, however, even as between the parties, pleadable as an estoppel (d); which is perhaps the only safe doctrine to be deduced from the decision in *Simpson v. Fogo*, a case which has been often cited as at variance with the principles which have been already enunciated. In *Simpson v. Fogo*, a creditor of the owners of a British ship obtained in Louisiana a judgment against them under which their interest in the ship, and no more, was sold under process of execution. The Bank of Liverpool, who had at the time a mortgage on the ship valid according to English law, intervened in the Louisiana proceedings, and a judgment was pronounced against them on the ground that

(a) *Per Blackburn, J.*, in *Castrique v. Imrie*, L. R. 4 H. L. 414, 427.

(b) *Per Blackburn, J.*, *Castrique v. Imrie*, 99 L. J. C. P. 354; L. R. 4 H. L. 414.

(c) *Hobbs v. Henning*, 17 C. B. N.S. 791.

(d) *Simpson v. Fogo*, 29 L. J. Ch. 657; *Hobbs v. Henning*, 17 C. B. N.S. 791.

the law of Louisiana ignored all rights, even though acquired in England in an English ship, before the vessel had passed into the jurisdiction of Louisiana, that had not been acquired according to Louisiana law. It was held that the Bank of Liverpool were nevertheless not estopped from setting up their right as mortgagees in an English Court; and inasmuch as the Louisiana Court did ultimately pronounce as to the ownership of and entire proprietary right in a ship which was at the time within its territorial jurisdiction, though that decision was not originally necessary to the suit, and would probably not have been given if the Bank of Liverpool had not intervened, it is difficult to see how the subsequent English decision can be reconciled with the theory of the conclusiveness of foreign judgments *in rem* which has just been stated, or with the more important cases in the superior English Courts which have followed it (a). The judgment was no doubt influenced by the consideration that the Louisiana Court had taken an entirely erroneous view, according to the principles of private international law, of their power to ignore a proprietary right which had once well accrued (b); a defect for which it has often been contended that a foreign judgment may be successfully impeached (c).

Accepting, then, as incontrovertible the principle that a foreign judgment *in rem* is conclusive in all courts and against all parties, it remains to consider to what its conclusiveness has been held to extend. As to the facts directly adjudicated upon there can be no doubt; but there is often difficulty in applying the principle to facts inferentially decided, as well as to the grounds, expressed or implied, of the foreign decision. The safest expression of the English law on this subject appears to be that the truth of every fact, which the foreign Court has found, either as part of its actual adjudication, or as one of the stated grounds of that decision, must be taken to be con-

*Judgment
in rem—
conclusive as
to adjudication
and stated
grounds of
decision.*

(a) *Cammell v. Sewell*, 3 H. & N. 640; 5 H. & N. 728; *Castrique v. Imrie*, L. R. 4 H. L. 414; 39 L. J. C. P. 350.

(b) *Ante*, p. 178; *Cammell v. Sewell*, 5 H. & N. 728.

(c) But see *ante*, p. 456.

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clusively established (*a*). The judgment relied on must clearly be a judgment upon the point in controversy. Thus the judgment of a French Court of Admiralty, condemning a ship as prize, was held not to be conclusive as to the question of neutrality in an action against the underwriters, as the judgment itself did not state its foundation, and it was shewn that it might have proceeded on another ground; viz., the violation of the French law by throwing overboard the ship's papers (*b*). It was said in a subsequent case, that where no other possible ground of condemnation was shewn to the Court by evidence, the foreign condemnation was to be taken as conclusive that the ship was enemies' property (*c*); but the truer doctrine would seem to be, that the foreign Court will not be taken as having established any fact which it has not expressly found, and laid down in the judgment relied on (*d*). No presumption as to the grounds upon which it proceeded will therefore be made by another tribunal.

**Judgment—
—when not
examinable
for fraud.**

It was said above, that a foreign judgment *in rem* can, like any other, be impeached for fraud (*e*); but it is clear that the fraud alleged must not be something which might have been raised as a defence in the foreign court upon the facts which were then before it. To impeach a foreign judgment on such grounds as that would be to allow a plea which ought to have been pleaded in the action on which the judgment was founded (*f*). Thus an action will not lie for a conspiracy to obtain a foreign judgment *in rem* against the plaintiff, unless it appears at any rate that the plaintiff had no notice of the foreign

(*a*) *Hobbs v. Henning*, 17 C. B. N.S. 791, 825; 34 L. J. C. P. 117; *Kindersley v. Chase*, Park, Ins. 490; *Baring v. Clagett*, 3 B. & P. 214; *Bolton v. Gladstone*, 5 East, 160; *Blad v. Bamfield*, 3 Swanst. 60.

(*b*) *Bernardi v. Motteux*, 2 Dougl. 575.

(*c*) *Saloucci v. Woodmass*, Park, Ins. 362.

(*d*) *Hobbs v. Henning*, 17 C. B. N.S. 791; 34 L. J. C. P. 117; *Fisher v. Ogle*, 1 Camp. 418; *Dagleish v. Hodgson*, 7 Bing. 504; and see *per Lord Eldon in Lothian v. Henderson*, 3 B. & P. 544.

(*e*) *Ante*, p. 469.

(*f*) *Westlake*, § 389; *Bowles v. Orr*, 1 Y. & C. Ex. 464; *Innes v. Mitchell*, 4 Drew. 102; *Castrique v. Behrens*, 30 L. J. Q. B. 163.

action, or that the questions upon which the truth of his allegations of conspiracy rest were not raised or determined by it (a).

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(iii.) *Foreign Judgments on Status.*

How far a foreign judgment on a question of fact or law affecting the *status* of a person is analogous to a foreign judgment *in rem*, determining the ownership of a particular thing, is doubtful. It has been seen that a judgment *in rem* can only claim recognition abroad when pronounced by a tribunal which had jurisdiction over the subject-matter; the jurisdiction in that case being ascertained by the easily applied test of local situation. The question whether a particular tribunal has jurisdiction over the *status* of a particular person, depending as it does upon mixed considerations of nationality, domicil, and transient presence within certain territorial limits, is a far more complex one; and has already been discussed when treating of personal *status*. There is, however, one characteristic common to foreign judgments *in rem* and on *status*. If the latter are accepted at all, and so far as they are accepted by an English Court, the action in which they are relied on need not be brought for the same purpose, and on the same cause as the foreign suit in which they were originally pronounced (b). Nor, according to the judgment of Lord Cranworth in the case cited, is it necessary that the action should be between the parties *in the same character*; inasmuch as the judgment is not relied on as shewing that the demand is *res judicata* between two persons, but as the decision of a Court of exclusive jurisdiction on subject-matter within that jurisdiction, a decision which another Court is bound to receive without inquiry as to its conformity or non-conformity with the laws of the country where it was pronounced (c). The

Judgments on
status of
persons.

(a) *Castriques v. Behrens*, 30 L. J. Q. B. 163; *Bank of Australasia v. Nias*, 16 Q. B. 717.

(b) *Doglioni v. Crispin*, L. R. 1 H. L. 301; 35 L. J. P. & M. 129.

(c) S.C. 35 L. J. P. & M. 135.

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Divorce and
legitimacy.

same reasoning would seem to shew that it need not be a judgment between the same parties at all, a principle which, with regard to judgments *in rem*, is well established (*a*). And if a decree of divorce be considered as a judgment on *status*, which is probably the most correct way of regarding it, there can be no doubt that its validity, if recognised at all, will be recognised in suits other than those between the former husband and wife. Thus, the validity of a Scotch divorce was examined by the House of Lords in a suit brought by the children of a second marriage of the mother; and if it had been held that the Scotch Court had had jurisdiction to pronounce it, there can be no doubt that it would have been accepted as conclusive (*b*). Sentences of divorce, indeed, are oftenest called into question to prove or disprove the legitimacy of certain persons descended from one of the divorced pair. With regard to the competency of a foreign Court to decree a divorce, in the several cases where the original marriage was or was not celebrated within the jurisdiction, and where the parties were or were not domiciled there at the time of the marriage and of its dissolution, it is unnecessary to repeat what has been already said (*c*). But if the Court which decreed the divorce had jurisdiction to make such a decree, according to the estimate formed by English law of that jurisdiction, it is certain that such a foreign judgment will receive full recognition here as conclusive and binding, whether in a suit between the same parties or between strangers to the original decree (*d*). Judgments upon the *status* of a person are, in fact, regarded as closely akin to judgments upon the *status* or ownership of a thing. "The rule," says Erle, C.J., "making the decision of a Court which creates the *status* of a person or thing conclusive upon all persons as to the existence of that *status*, has been regarded as salutary. Sentences of

(*a*) *Ante*, p. 470.

(*b*) *Shaw v. Gould*, L. R. 3 H. L. 55; *Shaw v. Attorney-General*, L. R. 2 P. & D. 156.

(*c*) *Ante*, p. 59.

(*d*) *Roach v. Garran*, 1 Ves. 157; *Kennedy v. Cassilis*, 2 Swanst. 313.

nullity of marriage in the Ecclesiastical Courts, of forfeiture in the Exchequer, of settlement of paupers by the quarter sessions, and of prize in prize-courts, are examples" (a). The word "creates," as used by Erle, C.J., in the passage quoted, must of course be taken to include the essential requisite of jurisdiction, without which there would be no creation which a foreign Court would recognise, either of *status* in such an action as is there referred to, or of a right and obligation in an action *in personam*.

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Judgments.

(iv.) *Lis alibi pendens.*

Closely analogous to the subject of foreign judgments Plea of *lis alibi pendens*. is the plea of *lis alibi pendens*, as to which it is only necessary to say that it is a good defence only where the two Courts have concurrent jurisdiction under the same sovereign authority (b), in which case, however, the statutory relation between the Courts, or the terms in which the sovereign authority is delegated, will in most instances modify the general principle. The amalgamation of the various English Courts into the High Court of Justice, by the operation of the Judicature Acts, 1873 and 1875, will deprive the subject of much practical interest in England for the future (c). It may be added that the pendency of an action in an inferior court was never pleadable, in abatement or bar, to one in a superior (d). And even where the two Courts have concurrent jurisdiction under the same sovereign authority, so that neither is, in the strict sense of the word, foreign to the other, the plea of *lis alibi pendens* was never held available where the one suit was originally *in personam*, and the other *in rem*,

(a) *Hobbs v. Henning*, 17 C. B. N.S. 791, 823; see *Hughes v. Cornelius*, 3 Show. 232; 2 Sm. L. C. 773, and notes to *Doe v. Oliver*, *ib.* 777. As to the recognition by Court of Chancery of a judgment of the Ecclesiastical Court in 1834 on the validity of a will, see *Douglas v. Cooper*, 3 My. & K. 378.

(b) *Ostell v. Lepage*, 5 De G. & S. 95, 105.

(c) See on this subject, Comyn's Dig. tit. "Abatement," H. 24; Bac. Abr. tit. "Abatement," M.; *Mayor of London v. B.*, 3 Keb. 491; Freem. 401; Gilbert's Hist. of C. P. p. 254.

(d) 5 Co. 62, a; 2 Lord Raymond, 1102; Comyn's Dig. tit. "Abatement," H. 24, 9.

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Suit pending
in foreign
Court.

though the subject-matter of the second suit might have been collaterally attached or affected by the first. The two suits must, to render the plea a good one, be in their nature the same (*a*). The plea that another action is pending in a strictly foreign court for the same cause, when the tribunal before which the plea is raised has undoubtedly jurisdiction over the subject-matter, is in no case an available defence. "It would be no answer, even in abatement of the writ, that an action was pending here in an inferior court, and how in law or reason can it be, that it is pending in a foreign court, when the action is in no sense local?" (*b*) The authorities referred to shew that the *dictum* of Lord Cottenham in *Wedderburn v. Wedderburn*, which has been cited for the opposite theory, cannot be regarded as law (*c*); and it may now be taken as established that no decree or order of a foreign tribunal, and *à fortiori* no proceeding or suit pending there, can be pleaded in an English Court, except a final and conclusive judgment, pronounced by a Court of competent jurisdiction (*d*). The matter, moreover, must have been *res judicata* in the foreign court at the time when the action was commenced in the English one; and the fact that there was at the commencement of the English suit a *lis alibi pendens* abroad, on which judgment was given in time to be pleaded in England, is no defence in the latter suit (*e*). In such a case, the proper course for the party objecting to being harassed by two suits to take is to apply to the English Court to put the other litigant to his election, by compelling him to abandon one or the other of the suits (*f*). But the mere fact that an appeal

(*a*) *Harmer v. Bell*, 7 Moo. P. C. 267, 286.

(*b*) *Per Pollock*, C.B., in *Scott v. Seymour*, 1 H. & C. 219, 229; *Cox v. Mitchell*, 7 C. B. N.S. 55; *Ostell v. Lepage*, 5 De G. & S. 95, 105; *Bayley v. Edwards*, 3 Swanst. 703; *Maule v. Murray*, 7 T. R. 470; *Dillon v. Alvares*, 4 Ves. 357.

(*c*) *Wedderburn v. Wedderburn*, 4 My. & Cr. 585, 596.

(*d*) *Ante*, p. 461; *Ricardo v. Garcias*, 14 Sim. 265; S.C. 12 Cl. & F. 380, and cases cited at p. 389; *Frayes v. Worms*, 10 C. B. N.S. 149; *Plummer v. Woodburne*, 4 B. & C. 625; *Smith v. Nicolls*, 5 N. C. 208; 7 Scott, 147.

(*e*) *The Delta, The Erminia Foscolo*, L. R. 1 P. D. 393.

(*f*) *The Catterina Chiazzare*, L. R. 1 P. D. 368; *The Mali Ivo*, L. R. 2 A. & E. 356; *The Delta*, L. R. 1 P. D. 393, 404.

is pending abroad against the foreign judgment does not deprive the judgment itself of the force of *res judicata* in an English Court (*a*).

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SUMMARY.**FOREIGN JUDGMENTS.**

A foreign judgment, though not a merger of the original p. 443. cause of action, gives rise to a legal obligation to obey its decree.

Foreign judgments may be impeached in an English pp. 445, 449. Court for a defect in the jurisdiction of the Court which pronounced them, or for the fraud of the litigant relying on them; but not for error of law or of fact (except an pp. 450, 460-
error in the law of the Court which pronounced it, admitted ^{468.} admitted by the parties); nor on the merits.

The sufficiency of the notice given to the defendant by p. 457. the foreign tribunal is included under the head of jurisdiction.

If no fraud or defect in the jurisdiction is alleged, a p. 467. foreign judgment *in personam*, final in the court which pronounced it, is conclusive in every other court between the same parties or privies, whether relied on by a plaintiff or defendant.

Subject to the same qualifications, a foreign judgment p. 468. *in rem* is conclusive not only between the same parties or privies, but as against all the world, though not pleadable as an estoppel even between parties to the original action. No presumption will be allowed as to the grounds on p. 471. which it proceeded, but where those grounds are expressed, it will be conclusive as to them, as well as with respect to the facts directly adjudicated upon.

A foreign judgment on *status* stands in the same position p. 473. as a foreign judgment *in rem*, the question of the jurisdiction of the Court which pronounced it being decided by the ordinary rules applicable to the *status* of persons.

(*a*) *Munro v. Pilkington*, 31 L. J. Q. B. 81; *Castrique v. Behrens*, 30 L. J. Q. B. 163.

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The rule that a foreign judgment, to be relied on, must be conclusive, operates to exclude the plea of *lis alibi pendens*, when the prior suit is pending in a foreign court; as well as the plea of *res judicata*, when the prior suit was pending in the foreign court when the action in which it is pleaded commenced; but the fact that an appeal is pending against the judgment relied on, does not affect its validity in a foreign court.

CONTINUOUS SUMMARY.

PART I.—PERSONS.

Nationality.

Nationality, according to the English Common Law, was pp. 1-7. decided absolutely and once for all by the place of birth. Those who were born within the allegiance of the British Crown, and those only, were regarded throughout their lives as British subjects.

By the statutes previous to 33 & 34 Vict. c. 14 (25 Edw. III. st. 2, 7 Anne c. 5, s. 3, 4 Geo. II. c. 21, and 13 Geo. III. c. 21) the privileges of nationality were conferred on the descendants, up to and including the second generation, of a natural-born British subject who were born abroad, the transmission of this statutory nationality depending upon the father alone.

By 33 & 34 Vict. c. 14, the restrictions on the capacities of aliens were abolished so far as the power of inheriting or otherwise taking British land was concerned, and statutory means were provided (superseding those which had formerly existed) for the naturalization and de-nationalization of aliens in Great Britain, and of British subjects abroad.

The nationality of a married woman follows that of her husband, and the nationality of children follows that of the father, or of the mother if a widow. A married woman who becomes a widow may change her nationality under the provisions of 33 & 34 Vict. c. 14.

The legislatures of British possessions and colonies may

confer a limited British nationality, valid within their territorial limits.

On the cession or abandonment of territory, by conquest or otherwise, the nationality of the inhabitants is generally provided for by treaty; but in the absence of treaty provisions, will probably depend upon the voluntary transfer or retention of their domicil.

Domicil.

Domicil is that relation of an individual to a State or country which arises from residence within its limits as a member of its community. In ordinary language, that country is said to be the country of his *domicil*, and he is spoken of as *domiciled* within it.

Every individual is regarded by the law as *domiciled* in some one country at every period of his life, and can only be *domiciled* in one country at a time.
pp. 8, 9.

p. 9.

A *domicil* spoken of as the *domicil of origin* attaches to every individual at his birth. In the case of posthumous or illegitimate children, the *domicil of origin* is the *domicil* of the mother at the time of the birth; in all other cases it is regarded as derived from the father.

pp. 9, 10.

The *domicil* of the child continues through legal infancy to be that of the parent from which it was derived, and follows the changes of the latter. An infant who marries and changes its home must, for this purpose, be regarded as *sui juris*.

p. 10.

The *domicil* of an orphan becomes and follows that of its legal guardian. It is, however, doubtful whether a guardian by changing his own *domicil* can so alter that of the minor as to affect the right of succession to the minor's property, at any rate when there is a fraudulent or self-interested intention that it shall be so affected.

The *domicil* of origin adheres until a new *domicil* is acquired.

pp. 10-12.

The *domicil of origin* is changed, in the case of a person *sui juris*, by a *de facto* removal to a home in a new

country, with an *animus non revertendi* and an *animus manendi*; or in the case of a woman, by marrying a man whose domicil is different from her own.

A domicil which is not the domicil of origin, but has been acquired, is lost by actual abandonment, *animo non revertendi*. Until a new domicil is acquired, the domicil of origin temporarily reverts.

When an acquired domicil has thus been divested, a new domicil is acquired by complete transit to a new country, and the establishment there, *animo manendi*, of a home.

The *animus manendi* or *non revertendi* is a question of pp. 12-16, fact for the Court, as to which neither a declaration *ante litem motam*, nor an affidavit *post litem motam*, by the person whose domicil is in question, is conclusive, though all such statements are evidence to be taken into consideration.

The *animus manendi* will in certain cases be a pre- p. 16. sumption of law which will not admit contradiction.

The domicil of a married woman becomes and follows pp. 17, 18. that of her husband, but in the event of his death, of a divorce, or of a judicial separation, she becomes re-invested with the power of acquiring a new domicil of her own. The same result may probably be regarded as following from certain exceptional circumstances, such as desertion by the husband.

Domicil, for the purposes of succession, to movable pp. 22-24. property, testate or intestate, is further regulated by 24 & 25 Vict. c. 121. By this Act it is provided, that, subject to conventions to be made with foreign States for its reciprocal application, British subjects dying in a foreign country shall be deemed, for all purposes of testate or intestate succession as to movables, to retain the domicil they possessed at the time of going to reside in such foreign country, unless they have resided in such foreign country for a year at least before the death, and shall have made a formal written declaration of an intention to become domiciled there. Similar provisions are made

with regard to the subjects of foreign States dying in Great Britain.

Capacity.

Where the *lex loci* of an act or a contract competes with the *lex domicilii* of the person with regard to his capacity, the former prevails.

pp. 31-33.

(Except so far as this rule may be regarded as modified or contradicted by the isolated *dictum* in *Sottomayor v. De Barros*, referred to above, p. 32.)

pp. 33-35.

Where there is no act or contract in any particular place to invite the competition of a *lex loci*, but the question is one of the mere *fact* of capacity, the decision of the law of the domicil will be accepted in preference to that of the *lex fori*.

pp. 35, 36.

But even though a personal incapacity, as defined by the foreign law of the domicil, be recognised by English law, the *status*, rights, and powers of the persons appointed by that foreign law to supplement that incapacity as guardians, tutors, curators, or committees, cannot claim or expect as a right a similar recognition. No such rights or powers extend beyond the jurisdiction of the law which created them.

p. 37.

The creation of such rights and powers by a foreign law is nevertheless a fact to be taken into consideration by an English Court, which will protect or even be guided by those rights and powers where it may seem expedient.

Legitimacy.

pp. 39, 46.

Legitimacy for purposes of succession to immovable property, including chattels, real, in England is tested both by the English law as the *lex situs*, and by the *lex domicilii* of the inheritor, "Legitimacy" (by the law of the domicil) alone is not sufficient; "it must be legitimacy *sub modo*—legitimacy, and being born in wedlock."

pp. 41, 42.

Legitimacy for purposes of succession to movable property by devise is tested by the law of the domicil of the

testator, that being the only law which has the right to interpret the meaning of such words as "children" in the will. Under a bequest in an English will to the children of A., a person domiciled in a country where legitimation *per subsequens matrimonium* is allowed, the children of A. who have been legitimated in that manner are not entitled to take.

Legitimacy for purposes of succession to movable property *ab intestato* is similarly tested by the law of the domicil of the intestate. (Direct authority wanting, but established by *dicta*.)

Legitimacy for the purpose of estimating legacy and succession duty on movable property is decided by the same rules.

[By the Scotch law, legitimacy for purposes of succession generally, other than succession to real estate, is referred to the law of the domicil —*i.e.*, the domicil of the father at the time of the birth. In cases of legitimation *per subsequens matrimonium*, a change in the domicil of the father after the birth and before the marriage is immaterial. The law of the domicil at the time of the birth decides once for all whether the child's bastardy is indelible or provisional only. Such legitimation, according to the law of domicil, will not however render a child born abroad, of a Scotchman by domicil and nationality, a natural-born British subject entitled, under 4 Geo. II. c. 21, to hold British land.]

Legitimacy for purposes other than succession under a will or *ab intestato* has not hitherto come in question, but the *dicta* point to the acceptance of the law of the domicil of the person on the point. The domicil of the person for such purposes is the domicil of *the father at the time of the birth*, as distinguished from the domicil of the place of birth, or of the father at the time of the subsequent marriage.

But legitimacy by the law of the domicil will not in any case be accepted, either by Scotch or English law, if its acceptance involves the recognition by that law of

the validity of a marriage which it regards as incestuous or criminal.

Marriage.

p. 48-54.

Marriage is governed, as to its *essentials*, by the law of the domicil of the parties; as to its *forms*, by the law of the place of celebration.

The law of the domicil of the parties is the proper law to decide whether the marriage can, by the use of any forms, ceremonies, or preliminaries, be effected.

The law of the place of celebration is the proper law to decide what forms, ceremonies, or preliminaries, shall be employed.

If the law of the matrimonial domicil is such that the marriage cannot be effected by obeying its directions, but can be effected by obtaining a dispensation from its prohibitions, the marriage cannot, in the absence of such dispensation, be legalized by the law of the place of celebration.

p. 57.

The law of any country may, and the English Royal Marriage Act does, not only prohibit certain persons from contracting marriage in England except on certain prescribed conditions, but refuse to recognise any marriage contracted by such persons elsewhere when these conditions have not been complied with.

p. 53.

Marriage, to be recognised by an English Court, must be that which is recognised as marriage by Christendom, and not a mere disguise for illicit intercourse or criminal incest.

Dissolution of Marriage.

pp. 59, 60.

Where a marriage has been celebrated in England, and the domicil of the parties is British, a foreign divorce purporting to dissolve it will in no case be recognised.

When the parties to such a marriage were domiciled abroad at the time of its celebration, and the law of the same continuing domicil purports to divorce them, the

better opinion seems to be that an English Court would p. 61. recognise and act upon such a divorce, if granted for a cause of divorce recognised in this country. (But see *contrà*, *McCarthy v. Decaix*, 2 Russ. & My. 614.)

The same principle would accord the same recognition to a foreign divorce granted by the law of the domicil, where the domicil of the parties had been English at the pp. 61, 62. time of the marriage, and had been subsequently changed. (But see the same case, *contrà*.)

Where a marriage has been celebrated abroad, an English Court will assume jurisdiction to dissolve it if it pp. 63–66. can be shewn that the matrimonial domicil is English at the time of the application.

But it appears to be now settled, that nothing less than a domicil in England will found this jurisdiction, although in one case (*Brodie v. Brodie*, 2 Sw. & Tr. 259) it was implied that residence not amounting to domicil would do ; and in another, even more questionable, where pp. 67–69. the matrimonial domicil was originally English, but had become American, the Court dissolved the marriage on the ground of the original English domicil and continuing British allegiance (*Deck v. Deck*, 2 Sw. & Tr. 90). So, it would seem, the Court may exercise its jurisdiction, notwithstanding the want of an English domicil, if the respondent submit by appearance, and taking practical steps in the cause, though a former submission in another cause is not sufficient.

Foreign Corporations, States, Sovereigns, and Ambassadors.

(i.) *Foreign Corporations*.—The artificial personalities or corporate bodies which are created by the municipal laws pp. 71, 72. of foreign States are recognised in English courts, when their character is substantially the same as that of a corporation created by English law.

A foreign corporate body may therefore sue and be sued in England under its corporate name ; and the provisions pp. 72–74. in the Rules under the Judicature Acts, for service of a 74–79.

writ of summons or notice thereof abroad, apply to these artificial as well as to natural persons.

Where a foreign corporation carries on business at a branch office in England, with a clerk or officer in the nature of a head officer there, whose knowledge would be the knowledge of the corporation, service of a writ may be effected on such officer. If there is no such officer in England, notice of the writ should be served on the head office of the corporation abroad.

The recognition accorded by English Courts to foreign corporations does not, except as above stated, expose them to the operation of the English enactments regulating English corporations ; unless, it seems, their creation proceeded from the laws of a jurisdiction subordinate to the British Crown.

A foreign corporation, though incapable of domicil in the strict sense, may reside beyond the limits of the State which created it. Except perhaps for the purposes of jurisdiction and service of process, a foreign corporation resides only in the principal seat of its business. Such residence is a question of fact, in which the locality of its incorporation and registration, the seat of its governing body, and the place where its profits are made, realised, or remitted, are all elements to be considered. Foreign corporations, when litigant in an English court, occupy the same position with regard to the conduct of the action as natural persons, and may be compelled to make discovery and answer interrogatories by a proper representative.

(ii.) *Foreign States and Sovereigns.*—Foreign States, or bodies politic created by international law, occupy a position analogous to that of foreign corporations. In the case of monarchical governments, the Sovereign may be regarded as a corporation sole, representing the State ; in the case of democratic or republican governments, the State itself, under its international name or style, as a body politic, may be regarded as a corporation aggregate.

The sovereign power of a State, in either of these two cases, may sue in an English court under its quasi-corp-

rate or politic name in respect of the public property and *chooses in action* of the nation which it represents. The Sovereign, in the case of a monarchical government, may also sue in respect of his private rights and property as a private individual; but the practice has been hitherto not to give a Sovereign litigant, though successful, his costs.

Neither a personal Sovereign nor a body politic (or pp. 92-97. State) may be sued in an English court, unless the privilege of sovereignty has been waived, expressly or impliedly, by voluntary submission to the jurisdiction or otherwise.

But when a foreign Sovereign is also, in another capacity, pp. 94, 101. the subject of another sovereign State, he may be sued in the courts of that other State, if not in the courts of all States except his own, in respect of acts done by him in that subject and private capacity; though the *prima facie* presumption, with respect to all his acts, is that they were done by him in his character of Sovereign.

A foreign Sovereign or State, when litigant in an English court, occupies the same position, with respect to discovery and the other incidents of the suit, as a private individual.

The sovereignty and independence of an alleged Sovereign or body politic are matters which an English Court should know or ascertain judicially; and evidence to prove these facts need not, it appears, be offered by the parties to the action.

Acts of State, authorized or ratified by a sovereign power, create no civil rights or liabilities. pp. 103-105.

(iii.) *Foreign Ambassadors*.—Foreign ambassadors or ministers, with their families, officials, suites, servants and attendants, are, by the fiction of *extraterritorialité*, regarded as continuously resident in the State of which they are the representatives. Foreign ambassadors or ministers are, by international law, exempt from being sued or impleaded for any cause whatever in the courts of the State to which they are accredited. There is no English authority expressly extending this immunity to the inferior

members of the legation, or to their families, suites, and servants; but it is so extended by writers on international law.

p. 115. A foreign ambassador or minister does not lose this immunity, or waive his privilege, by engaging in trade; though the statutory protection given to the servants of ambassadors or ministers, and therefore by implication their common law immunity, is forfeited by such a course of action. The immunity may, however, be waived by appearing and pleading; and a privileged person, by taking such a course, places himself in the position of an ordinary litigant. The extent of this immunity, though not clearly defined by English precedents, is by writers on international law treated as including all writs and processes of court, and all judicial restraints upon the time, movements, or person of those entitled to the privilege.

p. 107. p. 106. p. 108. The rules of international law on this subject, adopted by the common law of England, have been amplified by statute (7 Anne c. 12); which declares all writs and processes, sued out against the person or goods of any foreign minister or ambassador, or of any domestic servant of such ambassador or minister, to be null and void. This statutory protection may be forfeited, in the case of the servant of an ambassador or minister, by engaging in trade.

pp. 110-112. To be entitled to this statutory protection as the domestic servant of an ambassador or minister, the claimant must be actually and *bonâ fide* in such service, and no colourable or collusive employment will do. The nature of the employment or service is in each case a question of fact; and proof that the claimant's name has been registered as such servant at the office of the Secretary of State, and thence transmitted to the office of the Sheriff, is insufficient evidence of that fact.

PART II.—PROPERTY.

IMMOVABLES.

(i.) *Jurisdiction as to Real Property (including chattels real) situate Abroad.*

The jurisdiction over real or immovable property, p. 121. abstracted from the acts and contracts of the persons who deal with it, belongs to the *forum situs* alone, which will administer the *lex situs* in exercising it.

And this general principle will prevent an action from being maintained in England for the possession of or property in foreign land, independently of any rule of procedure, such as those which formerly prevailed with respect to venue.

But where a personal equity, resulting either from a pp. 122–131. trust or a contract over which an English Court has jurisdiction attaches to an individual who is before the English Court or can be brought before it, the English Court will indirectly affect foreign land by acting *in personam*, i.e., upon the conscience of its own justiciable.

Thus, by the enforcement of such an equity, the title to the property in or the right to the possession of foreign land may be indirectly transferred.

The mere fact that a contract relates to foreign land, or p. 130. to the rights that are incident to its possession, will not exclude the jurisdiction of the English Court, if the contract is one with which it is otherwise competent to deal; at any rate, unless it is shewn that the Courts of the *situs* have already and properly assumed jurisdiction over the claim.

Where such an equity as that defined exists, the English pp. 131, 132.

Court will at its discretion restrain by injunction proceedings abroad with respect to the foreign land to which it relates.

p. 133.

But it seems that where the equity is absolutely repugnant to the *lex situs*, the English Court will not enforce it, though it would have done so had the equity in question been merely non-existent by that law.

pp. 134-137.

There is no direct authority to shew that the jurisdiction over torts to foreign land, which the English Courts were formerly prevented from assuming by the rules relating to venue, is extended by the abolition of those rules; but an action founded on such a tort, being for personal damages only, might on general principles be maintained here.

(ii.) *Nature and incidents of Real or Immovable Property.*

p. 139.

The *lex rei sitae* is entitled to determine what is, and what is not, real or immovable property.

pp. 140, 141.

The *lex rei sitae* may accordingly impress the character of personality upon the *res sita* for its own purposes (as for the payment of legacy duty), without abandoning its claim to regard the same *res sita* as realty or immovable property for the purposes of international law. The *lex rei sitae*, in calling the *res sita* personality, does not thereby convert it into movable personality. Movables and personality are not equivalent terms.

pp. 142-145.

The *lex rei sitae* will generally prevail as to questions of limitation and prescription in their application to real or immovable property, inasmuch as these naturally arise only in the *forum rei sitae*. There is some authority for saying that the *lex rei sitae* will also prevail when such questions arise in a foreign court; but among jurists there is some conflict of opinion on the point, the *lex fori* asserting its claim to deal with the matter as pertaining to the remedy.

pp. 146-151.

The *lex rei sitae* will determine the liability of real or immovable property for the debts of its deceased owner, testate or intestate, and the obligation of the heir in re-

spect of those debts. But this principle may be modified, (i.) by the rule that the construction of a will depends upon the law of the domicil of the deceased ; (ii.) by a personal equity affecting the heir.

(iii.) *Transfer of Immovable Property inter vivos.*

The *lex situs* determines all questions relating to the p. 152. transfer of real estate.

Thus (*inter alia*), it determines the capacity of the parties to the transfer.

[There is, however, little *direct* authority on this point, and jurists shew a tendency to decide capacity on this, as on all other matters, by the *lex domicilii*.]

The formalities of the transfer, and the restrictions on pp. 153, 154. the freedom of alienation, are similarly decided by the same law.

(iv.) *Succession to Immovable Property by Will.*

The *lex situs* decides the capacity of the testator to p. 155. devise immovable estate (see, however, the qualification of the rule just stated as to the capacity to transfer *inter vivos*), the formalities of the testamentary instrument, and its operation upon the land which it affects to devise.

But where a testator intends and attempts to devise pp. 155, 156. immovable estate by a will not effectual to do so by the *lex situs*, the heir of the immovable estate will not be permitted to take a bequest of movable personal estate under the will, and to defeat the same will as to the land. In such a case, he will be put to his election whether he will accept the will for all purposes or for none.

The liability of his foreign immovable estate to the p. 156. personal debts of the testator depends upon the *lex situs* alone, where no intention on the part of the testator to interfere with that law appears; and the law of his domicil cannot impose any burden upon such foreign immovable estate from which by its own law it is exempt.

p. 156. The intention of the testator to devise or burden foreign land by a will insufficient by the *lex situs* to do so, must, in order to impose a personal equity on the heir, be unequivocally expressed. General words, which might be satisfied by a different interpretation, will not be construed as evidence of such an intention.

p. 158. The construction of wills, even when foreign land may be indirectly affected by it, is for the law of the testator's domicil alone.

Alienation of Immovable Property by Act of Law.

p. 159. (v.) *Succession on Intestacy.*—The *lex situs* determines the heir; and the English law, speaking as the *lex situs*, requires that he should be legitimate not only according to its own rules, but by the law of his domicil also.

p. 160. The burdens, liabilities, and claims, of immovable property in the hands of the heir, in the absence of any equity arising from trust or contract, depend upon the *lex situs*.

pp. 161-163. But the conditions under which the heir of foreign land may share in the (movable) personality of the intestate, depend upon the law of the intestate's domicil, and not upon the *lex situs* of the foreign land.

p. 164. These rules, in cases of intestacy, are invariable, because there can be no demonstration of the intention of the owner that the foreign land should either bear or be exonerated from any particular debts, as there may be when a testamentary disposition has been made.

p. 165. (vi.) *Transfer on Bankruptcy.*—Under an English bankruptcy, the English bankruptcy law affects to vest in the trustee all the movable and immovable property of the bankrupt, wherever situate; and the Irish bankruptcy law is the same. The Scotch Bankruptcy Act is confined in terms to real estate within the British dominions; and on principles of international law, the English statute cannot be given a wider interpretation.

pp. 166, 167. A bankrupt is therefore not compellable, apparently, to

assign foreign land to his trustee or assignee in bankruptcy, unless there is some personal equity attaching to him by which the *forum* of the bankruptcy can indirectly compel him to do so by acting *in personam*. It is not clear how far such an assignment can properly be made a condition of his discharge.

(vii.) *Transfer on Marriage*.—The rights of husband p. 167. and wife in and to the English immovables of either are decided by English law, as the *lex situs*. *Semblé*, the *lex situs* has an equal claim to prevail when the situation of the immovables is foreign, whatever the matrimonial domicil.

MOVABLES.

(i.) *Jurisdiction as to Personal Property*.

Personal property, according to the English law, is not p. 170. coincident with the class of *movables* contemplated by the law of nations, but includes certain *immovables* as well. The terms are consequently not equivalent.

The maxim "*mobilia sequuntur personam*" applies to movables only; i.e., to such personal property as falls under that class.

Such personal property as is immovable comes under the rules which relate to the jurisdiction over immovables generally.

Movables are regarded as situate in the country of the p. 171. domicil of the owner, wherever they may be in fact; and the law of his domicil alone has consequently jurisdiction to deal with them for the purpose of distributing them among his creditors or successors. The situation in fact of movables within a particular jurisdiction will, nevertheless, warrant the local Courts in assuming to deal with them for certain purposes, at any rate so far as to entertain actions based on contracts which concern them, or the right to their possession. p. 172.

(ii.) *Alienation of Movable Personal Property by Transfer
inter vivos.*

pp. 175 180. When alienation of movable personal property is effected by transfer *inter vivos*, the law regards not so much the person and domicil of the owner, as the act or transfer by which the transfer is effected, and the situation, in fact, of the property transferred.

p. 176. If the property transferred, and the parties to the transfer, are all within the same jurisdiction, the transfer, according to the law of that jurisdiction, will confer a good title valid everywhere, under the dominion of whatever law the property afterwards passes.

But such a title will not be conferred if the property, at the moment of the transfer, be within another jurisdiction, by the law of which the attempted transfer is invalid or imperfect.

pp. 177-181. If the transfer be valid according to the law of the place where the property is in fact situate, the title conferred by it should be recognised as good everywhere, though imperfect by the law of the former owner's domicil, and though the property be afterwards brought within the dominion of that law.

p 181. The creation of a lien upon movable personal property is similarly referred to the law of the place where the property was in fact situate at the time when the lien was created.

(iii.) *Succession to Movable Personal Property.*

(a.) *Disposition of Movable Personal Property by Will.*

p 183. The Court of the domicil of the deceased at the time of his death has supreme jurisdiction, and the law of the domicil supreme authority, in all matters connected with the capacity of the testator, the formalities, execution, interpretation, construction, and effect, of a will of movable personal property.

But, under Lord Kingsdown's Act (24 & 25 Vict. c. 114), p. 184. the wills of British subjects, whether the domicil at the time of the death or of making, if made out of the United Kingdom, are also valid if the forms required either by the law of the place of making, the law of the domicil at the time of making, or the law of the domicil of origin have been complied with; and if made *within* the United Kingdom, are also valid if the forms required by the law of the place of making at the time of the making have been complied with. And by the same statute, no will, at least of a British subject, is revoked or becomes invalid by a change of domicil between the times of making and of the death.

But a power of appointment by will to movable personality, given under English law, will be validly exercised by a will made in conformity with English law, though not with the law of the domicil of the deceased at the time of his death. Such a will will be admitted to probate accordingly; though it seems that a will executed in compliance with the law of the domicil would be equally p. 191. entitled to recognition.

To entitle a will or other testamentary paper to English p. 193. probate, it must dispose of some personal property situate in England, or else be incorporated by express or implied reference in another will or testamentary paper entitled to probate on its own account.

In granting probate of the will of a testator not domiciled in England, the English Court will, as a rule, follow the grant of the Court of the domicil, and grant probate or administration with the will annexed to the person who has been duly clothed by the Court of the domicil with the power and duty of administering the estate.

(b.) *Succession to Movable Personal Property by operation of Law.*

The Court of the domicil of an intestate at the time of p. 194. his death has supreme jurisdiction, and the law of the

domicil supreme authority, in all matters connected with the succession to his movable personal estate.

p. 195.

The law of the domicil of the intestate will thus determine the persons entitled to administration, and those entitled to share in the distribution. The same law will decide their legitimacy, kinship, and mutual rights and liabilities touching exoneration, election, and all similar questions.

(c.) Right and Title of the Personal Representative.

p. 198.

A grant of probate or letters of administration has no extra-territorial operation ; and the personal representative under it acquires only a title to the personal chattels of the deceased within the jurisdiction of the Court which made the grant.

pp. 198-200.

To take possession of personalty in England, or sue for debts in an English Court, a personal representative must therefore prove the will or take out letters of administration here as well as in the country of the domicil of the deceased. But this rule does not operate to prevent a personal representative clothed with authority by the English Court from suing in England in respect of movables actually situate abroad.

p. 200.

In granting probate or letters of administration, the English Court will generally follow the grant (if any) made by the competent Court of the domicil ; but it appears doubtful if the mere fact, that a person has obtained a grant as executor in the foreign court, will entitle him as of right to recognition of that character here. If the English Court does not consider him entitled as executor, it will, it seems, grant him letters of administration *cum testamento annexo*.

p. 203.

The personal representative, when once clothed with authority by the English Court, is bound to administer the personal assets of the deceased in England.

The title of a personal representative to the personal assets within the jurisdiction of the Court from which he

derives his authority, is not divested by the removal of the assets to another jurisdiction, unless they are removed under such circumstances as to remain still unappropriated assets, belonging to the general estate.

The effect of Scotch and Irish probates in England is p. 204. regulated by the statutory provisions of 21 & 22 Vict. c. 56, s. 12, and 20 & 21 Vict. c. 95, respectively. A foreign personal representative, who has not obtained authority from an English Court, nor received English assets, cannot be sued in his representative character in England.

(d.) Probate and Administration Duty.

When probate or administration is granted by an Eng- p. 208. lish Court, probate or administration duty is payable to the English government on the value of the assets locally situate in England at the time of the death of the deceased, without reference to the law of his domicil, or the value of the assets situate there.

The local situation of transferable securities, which pass p. 209. from hand to hand, is that in which they are actually found.

The local situation of stocks and shares, transferable only in one place, is the place where they are so transferable.

If the law of the country where assets are locally situate p. 211. requires double administration to be taken out in order to reduce them into possession, double duty is payable to the local government. The law of the domicil of any or all of the parties is in such a case immaterial.

(e.) Succession and Legacy Duty.

Succession and legacy duty is payable to the English p. 212. government in respect of the personal estate of every testator who dies domiciled in England ; and is assessed not only on his personal estate in England, but upon all his personal movable estate, wherever situate in fact.

p. 213. The duty does not attach upon annuities or legacies charged on foreign land, nor upon chattels real abroad.

Succession duty is payable upon chattels real situate in England, though the domicil of the testator be foreign. The personal character of such estate, and its liability to English succession duty, is determined by the English law as the *lex situs*, claiming in that right to govern immovables.

p. 214. Succession duty is payable on personal estate appointed by the will of a testator domiciled abroad, under a power of appointment created by an English will or settlement. [And see the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 4.] So also, on successions to a settled fund vested in English trustees, consisting of English stocks and shares, though the instrument creating the settlement was the will of a testator domiciled abroad. But not, it seems, by the trustees who take immediately under such a will.

p. 217. So, where the instrument creating the trusts of the settlement is a deed *inter vivos*. So, it seems in such a case to be sufficient that the funds should be vested in English trustees, though they have not actually been brought into England.

p. 220. When succession duty is calculated according to the degree of relationship between the successor and the person from whom the succession is derived upon his death, that relationship is determined by the law of the domicil of the deceased.

(f.) *Distribution of Movable Personal Estate by Executors and Administrators.*

p. 220. The distribution of movable personal estate in the hands of executors or administrators is regulated generally by the law of the domicil of the deceased.

p. 221. But when the deceased was domiciled abroad, and ancillary administration is taken out here, it is doubtful whether the priorities of creditors will not be regulated by

the English law, as that from which the local administrator derives his authority. The English law will clearly prevail, as the *lex fori*, whenever a matter of procedure is involved.

Assignment of Movable Personal Estate on Bankruptcy or Insolvency.

To found the jurisdiction of the Bankruptcy Court, it is p. 230. not necessary that the alleged bankrupt should be domiciled in England. It is sufficient if the debt in respect of which bankruptcy proceedings are taken was contracted, and the act of bankruptcy took place, in England, the debtor himself being commorant or even transiently present there. And it seems to be enough that the last two conditions should be complied with, though the debt was contracted abroad.

Assignment under an English bankruptcy includes all movable personal estate of the bankrupt, wherever situate, and whatever his domicil.

The title of the trustee is therefore complete to all pp. 231, 232. movable chattels of the bankrupt abroad, including *chooses in action*. But if a foreign creditor of the bankrupt has obtained possession of any such movables by a competent judgment of a local Court, the title of the trustee will not prevail against him even in England ; though there is some authority for contending that if a domiciled Englishman has used like diligence, an English Court will not allow him to hold the proceeds as against the trustee. Nothing less, however, than a *judgment* of a competent foreign Court will in any case defeat the trustee's title.

Assignment under a foreign bankruptcy to foreign p. 234. assignees extends to all the movable personal estate of the bankrupt in England, including *chooses in action*. It is not, however, clear that if the bankrupt's domicil be English the title of his foreign assignees will prevail against that of his personal representative on his death.

The right of the foreign assignees to sue in England p. 235.

for a debt due to the bankrupt will be the same as that which would be conferred by an ordinary English assignment of the debt.

p. 237.

Priorities of creditors and all other questions of proof and distribution under a bankruptcy will be governed by the *lex fori*; which will deal with creditors who have submitted to the jurisdiction by coming before the Court without regard to their domicil.

Assignment of Personal Property on Marriage.

p. 239.

Where no marriage contract or settlement is entered into, the rights of the parties in and to each other's goods are absolutely regulated by the law of the domicil of the husband at the time the marriage takes place.

pp. 241, 243.

When there is such a marriage contract or settlement, the law of the domicil is *prima facie* that which regulates its validity and interpretation; but if the place where the contract is executed is not that of the matrimonial domicil, the governing law appears to be that of the place which must be taken to have been in the contemplation of the parties, either as their intended future residence, or as the *locus* of the subject-matter of the settlement.

p. 240.

Even where there is no dispute as to the proper governing law, in consequence of the marriage having been celebrated, and the contract entered into, in the country of the domicil; yet the rights created by it will not prevail against a subsequent bankruptcy of the husband in a competent foreign court, inasmuch as the distribution of assets in a *concursus* of creditors is governed by the *lex fori* alone.

PART III.—ACTS.

CONTRACTS.

(i.) *Jurisdiction on Contracts.*

The jurisdiction of English Courts to deal with contracts in which a foreign element existed was originally based on rules of practice alone; and the distinctions made by Roman law between the *forum actoris*, the *forum rei* and the *forum rei sitae*, *rei gestae*, or *rei solvendae*, were ignored. The test of *venue*, provided that personal service could be effected on the defendant within the realm, was the only one applied in the Common Law Courts; whilst the Court of Chancery, which was unrestricted by the rules of *venue*, had a discretionary power of ordering service without the realm in any suit. Actions for the possession of foreign immovables were excluded from all Courts; from the Common Law Courts by the rules of *venue*, and from the Court of Chancery on principle.

The Common Law Procedure Act, 1852, gave a similar power of ordering foreign service to the Common Law Courts, where the cause of action arose within the jurisdiction, or in respect of a breach of a contract made within the jurisdiction; a provision which was, after a judicial conflict, construed to include the case of a contract made abroad, but broken within the realm.

The provisions of the Judicature Acts, 1873 and 1875, give a similar discretionary power of ordering foreign service (a.) where the subject-matter of the action is land stock or property situate within the jurisdiction, (b.) in all actions on contracts made within the jurisdiction, or (c.) of which there has been a breach within the jurisdiction, wherever they were made, (d.) in actions touching any act

or thing done, to be done, or situate, within the jurisdiction. If the action does not fall under one of these heads, the mere English domicil or nationality of the contracting parties will not enable foreign service to be ordered. The restrictions arising from the rules of *venue* are abolished altogether.

p. 256.

Notwithstanding the abolition of *venue*, actions for the possession of or property in foreign immovables will not, it would seem, be now entertained, any more than they could have been in the Court of Chancery under the old practice. The mere fact, however, that a contract relates to foreign immovables will not restrain an English Court from dealing with it; and the Court of Chancery will of course indirectly affect foreign immovables by acting *in personam*, as heretofore.

(ii). Capacity to contract.

p. 262.

The capacity to contract in the ordinary sense of the word, and the so-called capacity to enter into a contract of marriage, are decided by different considerations, and governed by different rules.

pp. 260, 261.

The law of the place where the contract is entered into, the *lex loci celebrationis*, is, in common cases of contract, the law which must decide the capacity of the contractors. [Except so far as the *obiter dicta* in *Sottomayor v. De Barros* on appeal may be considered as establishing the supremacy of the *lex domicilii*.]

pp. 265-273.

In the contract of marriage, the question strictly speaking is generally not one of the capacity or incapacity of the parties, but of the legality or illegality of the marriage.

The law of the matrimonial domicil is the proper law to decide whether the marriage can, by the use of any forms, ceremonies, or preliminaries, be effected.

The law of the place of celebration is the proper law to decide what forms, ceremonies, or preliminaries, shall be employed.

If the law of the matrimonial domicil is such that the marriage cannot be effected by obeying its directions, but can be effected by obtaining a dispensation from its prohibitions, the marriage cannot, in the absence of such dispensation, be legalized by the law of the place of celebration.

The law of any country may, and the English Royal p. 273. Marriage Act does, not only prohibit certain persons from contracting marriage in England except on prescribed conditions, but refuse to recognise any marriage contracted by such persons elsewhere when those conditions have not been complied with.

(iii.) *Formalities of Contract.*

The forms and ceremonies which the law of the place p. 275. of celebration requires for the constitution of a contract, are necessary and sufficient for that purpose.

But where the *lex fori* demands that a contract shall be p. 277. evidenced in a particular manner, these rules of evidence must be complied with, though their indirect effect is to impose a formality of celebration not required by the *lex loci celebrationis* or *solutionis*, or to refuse as insufficient formalities by which the *lex loci* was satisfied.

Conversely, the *lex fori* may admit evidence which the p. 279. *lex loci* would have rejected; but the contract, though proved as a fact, will in such cases be held void if that evidence shews that the formalities prescribed by the *lex loci* for the validity of the contract, as distinguished from the manner of proving it, were not fulfilled.

The general rule, that formalities are governed by the p. 282. *lex loci (locus regit actum)* does not, however, apply to contracts which concern immovable property, as to which the *lex situs* prevails.

The stamps which the *lex fori* requires on documents p. 283. executed out of its jurisdiction are rightly prescribed by it, as coming under the head of evidence.

Where the *lex fori* is silent, the stamp requirements of the *lex loci actus* must be complied with.

(iv.) *Legality of the Contract.*

- p. 287. The legality of a contract depends generally upon the law of the place of intended performance.
- p. 288. An act which is illegal by the law of the place where it is intended to be done cannot be validly contracted for in any place.
- p. 292. But the legality of the making of the agreement, i.e., the giving a particular consideration for a particular promise—seems to depend upon the *lex loci actus*.

(v.) *Essentials of the Contract.*

- p. 298. Generally, the essentials of a contract are governed by that law which the parties intended by their agreement to adopt.
- p. 311. This law, *prima facie*, is the law of the place where the contract was made (*lex loci celebrationis*); but may be any other which the parties have sufficiently indicated their intention of adopting.
- pp. 301-309. (1.) *The construction and interpretation of contracts* is *prima facie* a matter for the *lex loci celebrationis*, but the object and subject-matter of the contract, the domicil of the parties, and the place of intended performance, may each and all indicate that the parties intended to refer the interpretation of their language to a different law.
- pp. 309-369. (2.) *The nature and incidents of the obligation* are also *prima facie* governed by the *lex loci celebrationis*, as the law which the parties are presumed to have intended to apply to the unforeseen incidents of the *vinculum* or legal tie.
- pp. 313, 326. But in contracts of affreightment and bottomry bonds the parties are presumed to have contracted with reference to the law of the ship's flag, that flag being a notice to

all the world of the extent of the master's authority to bind his owners. The validity, however, of a sale by the master of the ship or cargo, in a foreign port, depends upon the *lex loci actus*, which governs the transfer, without reference to the law of the flag.

And where it is expressly or impliedly agreed that any p. 339. future incidents of the contract shall be governed by the law of the place where they arise, that law will, of course, so far prevail.

Thus all incidents of performance will be governed by pp. 339, 369. the law of the place of performance.

With regard to bills of exchange, the contract of the p. 349. acceptor must be measured, so far as the original liability is concerned, by the law of the place where he enters into it; so far as the mode, time, and conditions of payment are concerned, by the law of the place where the bill is payable. The liability of the drawer and indorser, being conditional on default by the acceptor, will depend so far as that condition is concerned, upon the law of the place where the acceptor's contract ought to have been fulfilled. And it seems that the contract of the acceptor, as well as of his surety the drawer, is to pay to an indorsee under an indorsement valid by the law of the place of acceptance, though this is still doubtful.

The nature and incidents of a contract entered into by p. 365. an agent in a foreign place, and the extent of the agent's authority, would also seem to depend, *prima facie*, upon the law of the place where the agent contracts.

But in contracts of affreightment and hypothecation entered into by a master of a ship, the contract between the owners and freighters is referred to the law of the ship's flag; and *quære*, whether this principle does not extend to all contracts entered into by the master on behalf of the owners?

(3.) *Performance of the Contract.*—Performance or non- p. 369. performance of a contract, and the consequent dissolution of the obligation, is tested by the law of the place where the contract was intended to be performed.

*Quare, whether the unforeseen incidents of the obligation, which arise in the course of performance, are governed by the *lex loci celebrationis* or *solutionis*? Semblé, the former, at any rate if any external facts, such as the domicil of the parties, tend to indicate an intention to adopt that law.*

p. 373.

*The illegality, by the law of the place of performance, of the performance contracted for, invalidates the contract *ab initio*.*

p. 376.

*(4.) Discharge of the Contract otherwise than by performance.—The discharge of a contract, when not the natural result of the agreement, nor the indirect consequence of the rules of the *lex fori* as to the time within which a remedy must be sought, may be effected by the law of the place where the contract was made.*

p. 378.

A discharge by the laws or tribunals of a paramount legislature, such as that of the United Kingdom, will bind tribunals of the subordinate jurisdictions, wherever the contract was made, if the paramount legislature intended it to have that effect.

p. 382.

But a discharge, to claim recognition in a foreign Court, must be an absolute discharge of the obligation, and not a mere refusal of a remedy.

p. 384.

*A contract may also be discharged by a novation or a release, forming a new agreement between the parties, and executed according to the requirements of the *lex loci actus*.*

TORTS.

p. 389.

(i.) Jurisdiction as to Torts.—An English Court has jurisdiction to try actions based on torts to the person, or to movable personal property, wherever those torts were committed.

p. 390.

Torts to immovable property situate abroad were formerly excluded from English Courts by the technical rules of venue.

Whether they were also excluded by any principle of

international law, and whether, therefore, an English Court is still without jurisdiction to try actions based on such torts, has not been decided, and appears very doubtful.

(ii.) *Measure of the wrong done*.—When an action is p. 393. brought in an English Court on a tort committed abroad, the act complained of must be wrongful both by English law and by the law of the country where it was committed.

(Query, whether it must not only be wrongful, but also actionable, by the latter law?)

Legislation in the country where the act was committed, p. 394. purging the tort, though *ex post facto* and retrospective in its operation, will be a good answer to an action in an English Court.

If the place where the act complained of was committed p. 398. is not under the domain of any special municipal law, the *lex fori* will be applied to test the tortious nature of the act.

The *lex fori* in English Courts, with respect to wrongful collision on the high seas, is the general law maritime as administered in England.

But where both the parties to the collision are British p. 408. subjects, the general law maritime is modified by the Merchant Shipping Acts.

(iii.) *Measure of the remedy*.—The remedy in general p. 399. depends, like other questions of procedure, upon the *lex fori*, the question whether the act is one which is entitled to a remedy at all being decided by the law of the place where it was committed.

(Query, how far an act criminal but not actionable by the law of the place where it was committed is actionable in England?)

The provisions of the English Merchant Shipping Act p. 404. which limit the liability of the ship-owners for damage done by the ship are not rules of remedy or procedure which apply universally in the right of the *lex fori*, but are applicable by express enactment to foreign ships, when their rights and liabilities with respect to collision on the high seas come in question in an English Court.

p. 408.

The provisions of the English Merchant Shipping Acts which direct that redress shall not be given in cases of collision, where the rules of the same Acts as to navigation have not been complied with, are not rules of remedy or procedure, but tend to determine the tortious nature of the acts resulting in collision. They are not therefore applicable to collisions on the high seas, except between British vessels, or even to such collisions in British territorial waters.

PART IV.—PROCEDURE.

(i.) *Procedure and Evidence.*

The remedy is to be enforced according to the mode of p. 412. the *lex fori*, though the right of action be sometimes indirectly affected by the application of the rule. Thus,

(i.) (a.) The *lex fori* controls the question of the name in p. 413. which the action is to be brought, but not the title to a right of action, when that affects the ultimate direction in which its benefits are to flow. Title validly conferred creates a foundation for procedure.

(b.) So liability is determined by the proper law which p. 417. imposes it, but when a personal liability is once imposed, the mode in which it is enforced, as, for example, by joint or several procedure, depends upon the *lex fori*.

(ii.) The *lex fori* determines the time within which an p. 420. action may be brought; that is, the time within which an obligation may be enforced depends upon the law of the tribunal which is asked to enforce it. But when the competent law has declared that an obligation, after a given time, shall be extinguished, and not merely rendered incapable of being enforced in a particular tribunal, the law of another tribunal cannot, by fixing a longer term of prescription, revive it. This qualification would seem to apply, whether the party against whom it is sought to revive the defunct obligation has resided during the whole term of prescription under the dominion of the *lex contractus* or *actus*, or not.

(iii.) The *lex fori* determines the form and nature of the p. 424. action by which a personal liability is sought to be enforced, and the process or execution which the tribunal uses to enforce it. But the *lex fori* can never convert into a

personal liability that which is not so by the law which created the obligation.

p. 431. (iv.) The *lex fori* determines the evidence by which an obligation must or may be proved. It cannot, however, create an obligation where none existed before, though it may refuse to recognise one that already exists.

p. 432. (v.) All foreign facts, including the meaning of language and the existence of laws, are objective facts to be proved, of which the Court will not take judicial notice.

(ii.) *Foreign Judgments.*

p. 443. A foreign judgment, though not a merger of the original cause of action, gives rise to a legal obligation to obey its decree.

pp. 445, 449. Foreign judgments may be impeached in an English Court for a defect in the jurisdiction of the Court which pronounced them, or for the fraud of the litigant relying on them; but not for error of law or of fact (except an error in the law of the Court which pronounced it, admitted by the parties); nor on the merits.

p. 457. The sufficiency of the notice given to the defendant by the foreign tribunal is included under the head of jurisdiction.

p. 467. If no fraud or defect in the jurisdiction is alleged, a foreign judgment *in personam*, final in the court which pronounced it, is conclusive in every other court between the same parties or privies, whether relied on by a plaintiff or defendant.

p. 468. Subject to the same qualifications, a foreign judgment *in rem* is conclusive not only between the same parties or privies, but as against all the world, though not pleadable as an estoppel even between parties to the original action. No presumption will be allowed as to the grounds on which it proceeded, but where those grounds are expressed, it will be conclusive as to them, as well as with respect to the facts directly adjudicated upon.

p. 473. A foreign judgment on *status* stands in the same position

as a foreign judgment *in rem*, the question of the jurisdiction of the Court which pronounced it being decided by the ordinary rules applicable to the *status* of persons.

The rule that a foreign judgment, to be relied on, must p. 475. be conclusive, operates to exclude the plea of *lis alibi pendens*, when the prior suit is pending in a foreign court; as well as the plea of *res judicata*, when the prior suit was pending in the foreign court when the action in which it is pleaded commenced; but the fact that an appeal is pending against the judgment relied on, does not affect its validity in a foreign court.

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C. J. A. A.

LONDON : PRINTED BY WILLIAM CLOWES AND SONS, STAMFORD STREET
AND CHARING CROSS.

